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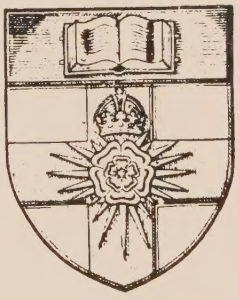

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AND

Ecclesiastical Courts.

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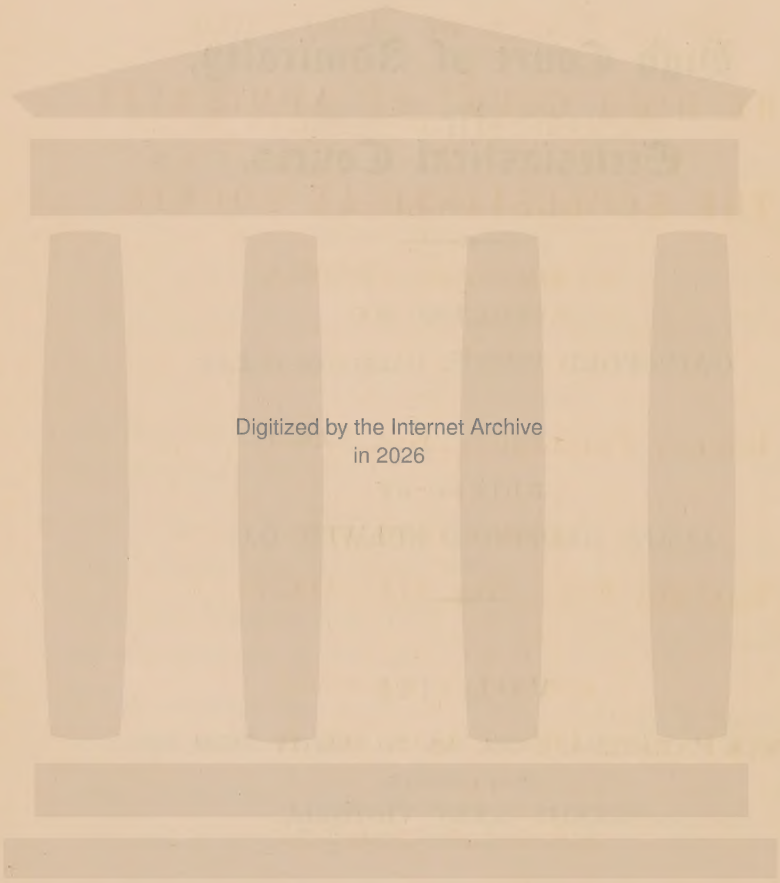

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CASES

DETERMINED BY THE

HIGH COURT OF ADMIRALTY

AND BY THE

ECCLESIASTICAL COURTS,

FROM

MICHAELMAS TERM TO TRINITY TERM,

XXXIII VICTORIA.

THE YOUNG JAMES.

1869
Nov. 9.

Costs—County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *ss.* 3 *and* 9—*Merchant Shipping Act Amendment Act,* 1862 (25 & 26 *Vict. c.* 63), *s.* 54.

An action of damage was instituted in the Admiralty Court in a sum exceeding 300*l.* It was admitted that the defendant's ship was to blame, and that the damage sustained by the plaintiffs' ship exceeded 300*l.* The defendant proved by affidavit that he was entitled, under the 54th section of the Merchant Shipping Act, 1862, to have his liability limited to a sum less than 300*l.*, and a tender of less than 300*l.* was accepted by the plaintiffs:—

Held, that the 9th section of the County Courts Admiralty Jurisdiction Act, 1868, did not disentitle the plaintiffs to costs.

This was a cause of damage instituted by the owners of the *Red Jacket* against the *Young James*. The *Red Jacket* was run down by the *Young James* at sea on the 16th of April, 1869; the *Red Jacket* sank soon after the collision. At the time of her loss she was of the value of 800*l.* The action was instituted on the 4th of June in the sum of 1000*l.*, and the *Young James* was arrested, but was released by consent on bail being given for 500*l.* The plaintiffs' preliminary act was filed on the 3rd of August. The defendant did

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not file a preliminary act, but on the 9th of September made an affidavit which contained the following statements:—

"I am the registered owner of the fishing smack called the *Young James*, belonging to the port of Great Yarmouth.

"I was not on board the *Young James* when the collision happened, and it occurred without my actual fault or privity.

"No loss of life or personal injury resulted from the collision, as I am informed and verily believe.

"The registered tonnage of my smack, *Young James*, is $30\frac{69}{100}$ tons and no more, and I was therefore advised, and believe that, presuming my vessel was solely to blame for the damage occasioned by the collision, the plaintiffs could recover no more than 248*l.*, being 8*l.* per ton upon the registered tonnage of my vessel, estimating such tonnage in round numbers as 31 tons."

This affidavit was duly filed, and on the 14th of September the defendant tendered by act in court the sum of 252*l.* 2*s.* in satisfaction of the claim of the plaintiffs. The sum of 252*l.* 2*s.* represented the value of the *Young James*, estimated at 8*l.* per ton, together with interest at 4 per cent. from the date of the collision to the time of tender. The plaintiffs' proctor gave notice to the defendant's proctor that he accepted this tender in respect of the damage so proceeded for, but reserved the question of interest and costs to be decided by the Court.

Nov. 3. *E. C. Clarkson*, on behalf of the plaintiffs, moved the Court to order the said sum of 252*l.* 2*s.* to be paid to the plaintiffs, and to condemn the defendant in the costs of the cause, and in interest on the sum of 248*l.* from the time of the tender to the day of payment, and, if necessary, to certify that the cause was a proper cause to be tried in the Court of Admiralty.

Gibson, in opposition to the motion. As the plaintiffs have not recovered a sum exceeding 300*l.*, they are not entitled to costs. The words of the 9th section of the County Courts Admiralty Jurisdiction Act, 1868, are imperative. That section provides that if any person shall take, in the Court of Admiralty, proceedings which he might, without agreement, have taken in a county court, and shall not recover a sum exceeding the amount to which the jurisdiction of the county court is limited, he shall not be entitled to costs without

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a certificate. The 3rd section confers jurisdiction upon a county court having admiralty jurisdiction to try and determine any cause for damage by collision in which the amount claimed does not exceed 300*l.* The phrase "amount claimed" must mean the amount justly claimed. It cannot be contended that a plaintiff may oust the jurisdiction of the county court, and entitle himself to costs in this court, simply by making an exorbitant claim. The phrase used in the old County Court Act, 9 & 10 Vict. c. 95, s. 67, is, "where the debt or damage *claimed* does not exceed 20*l.*" It was held, on the construction of that statute, that the amount claimed meant the amount really due: *Woodhams* v. *Newman.* (1) In *Emery* v. *Binns* (2) a similar construction was put upon a similar phrase in a Jamaica statute. The plaintiffs have asserted a claim which they have admitted they never had a right to maintain; and the proceedings in this cause are proceedings which might, as the result has proved, have been taken in a county court. The plaintiffs, therefore, cannot recover their costs unless "the judge of the High Court of Admiralty, or of a superior court before whom the cause is tried or heard," certify in accordance with the provisions of the 9th section of the County Courts Admiralty Jurisdiction Act. It is only a judge before whom the cause is tried or heard who has power to certify. This cause has not been tried or heard, and a certificate cannot be given: *Waylett* v. *Wyndham.* (3) The circumstances of the case are such that even if the Court has power to grant a certificate, it will refuse to do so.

Clarkson, in reply. In this case it is admitted that the plaintiffs have sustained damage to the extent of 800*l.* The plaintiffs had a just claim to that amount, and they would have been entitled to recover that amount if the defendant had not given evidence to prove that he was entitled to have his liability limited according to the provisions of the Merchant Shipping Act, 1854. It was not until the defendant filed the affidavit of the 8th of September that the facts were proved to prevent the plaintiff recovering more than the sum tendered. This is like a case where the demand of the plaintiff is reduced by set-off. The decision in *Woodhams* v. *Newman* (1) is in the plaintiffs' favour.

Cur. adv. vult.

(1) 7 C. B. 654. (2) 7 Moo. P. C. 195. (3) 2 H. & C. 982.

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Nov. 9. SIR ROBERT PHILLIMORE. This was a cause of damage instituted by the owners of a vessel called the *Red Jacket* against the owner of a vessel called the *Young James*.

The action was entered on the 4th of June in the sum of 1000*l.*; the damage done to the *Red Jacket* amounted to 800*l.*, the additional 200*l.* was to cover the costs. On the 27th of July the *Young James* was released, and bail was accepted to the amount of 500*l.* On the 3rd of August the plaintiffs filed their preliminary Act. On the 14th of September a tender of 258*l.* 2*s.* was filed. On the 29th of October that tender was accepted, the question of costs being reserved. On behalf of the *Red Jacket* it has been contended that this suit ought to have been instituted in the county court, inasmuch as it now appears that the amount claimed was less than 300*l.*, and that having regard to the 3rd and 9th sections of the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71) costs ought not to be allowed in this case. By the 3rd section of this Act the county court has jurisdiction where the amount claimed does not exceed 300*l.*, and by the 9th section, "If any person shall take in the High Court of Admiralty of England . . . proceedings which he might without agreement have taken in a county court" (except in certain cases not necessary to be here mentioned) "and shall not recover a sum exceeding the amount to which the jurisdiction of the county court in that admiralty cause is limited by this Act . . . he shall not be entitled to costs, and shall be liable to be condemned in costs, unless the judge of the High Court of Admiralty . . . shall certify that it was a proper admiralty cause to be tried in the High Court of Admiralty of England." These proceedings might, it is argued, "have been taken in a county court," and therefore the plaintiffs are not entitled to costs, and are liable to be condemned in costs; and it is further contended that it is not competent to the Court to certify for costs in this case, inasmuch as the cause has not been "tried or heard."

Upon the first point I was referred to an analogous enactment as to costs contained in 9 & 10 Vict. c. 95, which relates to actions for small debts brought in the superior courts, and there the words are "for which a plaint might have been entered, &c.;" and for the construction of these words I was referred to two cases,

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Woodhams v. *Newnham* (1) and *Emery* v. *Binns* (2), on the interpretation of a similar clause in a Jamaica Act. I entirely assent to the principle of these two decisions, which is, in effect, that the words, "for which a plaint might have been entered," must refer to an amount *justly or properly claimed*, and that it is not competent to the plaintiff to release himself from the restraint of the Act by entering an exorbitant claim, and so ousting the jurisdiction of the county court, and then, after the claim has been so ousted, reducing the amount to a sum which, if it had been originally claimed, would have brought it within the jurisdiction of the county court. But it was contended, on behalf of the plaintiffs, by Mr. Clarkson, in a clear and able argument, that neither the words of the statute nor the principle of these cases was hostile to the claim of his clients. The words of the statute, he contended, did not apply, because the damage done to the *Red Jacket* did amount to 800*l.*, and by the common law the *Young James* was liable for that sum, and the amount of claim, therefore, exceeded the jurisdiction of the county court. After the suit was instituted in this court, however, the defendant availed himself of the provisions contained in the 54th section of the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), and sought to have his liability limited to 8*l.* per ton. In order that the defendant might have his liability limited, it was necessary according to the practice of this court, that he should make an affidavit that the damage had occurred without the actual fault or privity of the owners, so as to bring him within the protection of the Act; and it was not till after these proceedings for the limitation of liability had been taken, which proceedings could not in this case have been taken in the county court, that the claim was reduced below the amount of 300*l.* In fact, this is analogous to the case of a demand reduced by a set-off, to which the judges in *Woodhams* v. *Newman* (1) held that the statute did not apply. In *Emery* v. *Binns* (2) no question of set-off or of limitation of liability, subsequent to the institution of the suit, arose. I am of opinion that this case was properly instituted in this court; it becomes, therefore, unnecessary to consider that part of the argument which relates to my inability to certify for costs, and to the autho-

(1) 7 C. B. 654. (2) 7 Moo. P. C. 195.

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rity cited of *Waylett* v. *Wyndham* (1) on the ground that the case has not been "heard or tried" before me. I pronounce for the prayer of the plaintiffs in this case, including thereby the condemnation of the defendant in costs.

Proctors for plaintiffs: *Shephard & Skipwith.*
Proctors for defendant: *H. C. Coote.*

Nov. 23.

THE NORTHUMBRIA.

Interest — Limited Liability of Shipowners — Merchant Shipping Act Amendment Act, 1862 (25 & 26 *Vict. c.* 63), *s.* 54.

The owners of a ship claiming in the Court of Admiralty to have their liability limited, in respect of damages occasioned by collision, to an aggregate amount not exceeding 8*l.* for each ton of the ship's tonnage, are liable to pay interest on such aggregate amount from the date of the collision.

THIS was a suit for limitation of liability instituted on behalf of the owners of the *Northumbria*. On the 20th of August, 1869, the *Northumbria* came into collision with the barque *Hesperia*, and the *Hesperia*, which was at the time outward bound and laden with cargo, was lost. The collision occurred without the actual fault and privity of the owners of the *Northumbria*. Two suits against the *Northumbria* were pending in the Court of Admiralty; one instituted by the owners of the *Hesperia*, and one by the owners of part of the cargo laden on board the *Hesperia*, to recover compensation for damage occasioned by the collision. There was reason to believe that other suits would be instituted by other owners of cargo on board the *Hesperia*, and the value of the *Northumbria* at 8*l.* a ton, was insufficient to answer the claims against the plaintiffs in respect of the collision. The plaintiffs stated the above facts in their petition, and prayed the Court to pronounce that the plaintiffs were not liable in respect of loss or damage to ship's goods, merchandize, or other things caused by the collision, to an aggregate amount exceeding 8*l.* for each ton of the registered tonnage of the *Northumbria*, and that the plaintiffs should be at liberty to pay into the registry such aggregate amount, and that upon

(1) 2 H. & C. 982.

such payment all further proceedings in the said suits instituted against the *Northumbria* should be stayed, and that all persons having any claim arising out of the collision should be restrained from bringing any other action against the *Northumbria* or against the plaintiffs in respect of the collision. The owners of the *Hesperia* and the owners of part of her cargo, the plaintiffs in the damage suits, appeared as defendants in this suit, and submitted that the owners of the *Northumbria* were liable in respect of the losses in the petition mentioned, to the aggregate amount in the petition mentioned, and to interest thereon from the date of the collision, and to the costs of the plaintiffs in the damage suits, and of the defendants in this suit.

Nov. 9. *Butt, Q.C.*, and *D. F. Steavenson*, for the plaintiffs, admitted that the plaintiffs were liable to pay the costs asked for, but contended that they were not liable to pay interest. First: No interest is payable under any circumstance in collision cases until after judgment. Secondly: In actions of tort interest cannot be given by any court except by express statutory provision. Thirdly: Interest is damages, and by the 54th section of the Merchant Shipping Act Amendment Act, 1862, the Court is expressly concluded from giving damages beyond 8*l.* per ton. Fourthly: If interest is due it is payable only from the time when the *Hesperia* would, in ordinary course, have arrived at her port of destination, and not from the time of the collision.

They cited Mayne on Damages, pp. 68, 69, 72; 1 Chitty on Pleading, 7th ed. p. 412; *Higgins* v. *Sargent* (1); 3 & 4 Wm. 4, c. 42; Sedgwick on Damages, pp. 263, 434, 446; *The Dundee* (2); *Nixon* v. *Roberts* (3); *Straker* v. *Hartland* (4); *The Amalia* (5); *African Steam Ship Company* v. *Swanzy* (6); *Attwood* v. *Taylor*. (7)

E. C. Clarkson, for the owners of the *Hesperia*, contended that interest is due from the date of the collision. The plaintiffs in a damage suit in this Court have a lien for the amount of damage done which comes into operation at the moment of the collision:

(1) 2 B. & C. 348.
(2) 2 Hagg. Adm. 137.
(3) 30 L. J. (Ch.) 844.
(4) 34 L. J. (Ch). 122
(5) 5 N. R. 164, note; 34 L. J. (P. M. & A.) 21.
(6) 2 K. & J. 660; 25 L. J. (Ch.) 870.
(7) 1 M. & G. 279.

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The Bold Buccleugh. (1) They are entitled to compensation at that time, and if the compensation is not paid then, interest becomes due on account of the delay in payment. This principle has been followed in this Court ever since Lord Stowell's time, and in the Court of Chancery: *General Iron Screw Collier Company* v. *Schurmanns.* (2) It is unnecessary to consider whether the words of the statute conferring limited liability, which was in force at the time that *The Dundee* (3) was decided, are precisely the same as the words of the statute now in force. They are, in effect, the same, the law as laid down in the *Dundee* (3), and other cases decided since, was perfectly well known at the time of the passing of the Merchant Shipping Act Amendment Act, 1862, and if the legislature had intended to take away the right to interest, it would have done so by express enactment. The rule referred to by Vice-Chancellor Wood, in *Straker* v. *Hartland* (4), whereby in case of the loss of a ship earning freight interest is payable only from the time when the ship would, in ordinary course, have arrived in port, does not apply, except in cases where the owners of the damaged ship receive full compensation for loss of freight. It does not apply where the owners of the wrongdoing ship claim to have their liability limited; because in such case the owners of the sunken ship do not obtain their freight, and interest is the only compensation that can be given to them for loss of freight.

G. Bruce, for the owners of the cargo of the *Hesperia.* The rules adopted by the common law courts, with reference to interest, are technical in the extreme, and this Court will not follow them. According to the principle of the civil law, interest is due upon the simple ground that one person delays the payment of money due to another. Lindley's Introduction to the Study of Jurisprudence, Appendix XCVII. This is the fair and reasonable rule, and the rule which this Court has always acted upon. In America, the common law courts even have acted upon it to some extent: Hilliard on Torts, vol. 2, p. 134, n. 3. The 54th section of the Merchant Shipping Act Amendment Act, 1862, does not take away the right to interest. That section limits the liability of the owners only in respect of damage to ships, goods, or mer-

(1) 7 Moo. P. C. 267.
(2) 29 L. J. (Ch.) 877.
(3) 2 Hagg. Adm. 137.
(4) 34 L. J. (Ch.) 122.

chandize. Interest here is claimed, in respect of damage for non-payment. The Court, by virtue of its equitable jurisdiction, has full power to give interest: *Tyne Improvement Commissioners* v. *General Steam Navigation Company.* (1) In a recent case in this Court, *The City of Buenos Ayres* (not reported), similar to the present, the Court ordered interest to be paid from the date of the collision.

Cur. adv. vult.

Nov. 23. SIR ROBERT PHILLIMORE. This was a suit for limitation of liability, brought by the *Northumbria*, the wrong doer in a collision with the *Hesperia*. The *Northumbria* pleads that the collision occurred without the actual fault or privity of the owners, that the *Hesperia* has instituted a suit against her for the recovery of a sum of 12,000*l.*, that one of the owners of the cargo has also brought an action against her, and that she has reason to believe that other suits will be brought by other owners; therefore she prays limitation of her liability under the statutes 17 & 18 Vict. c. 104, s. 504, 25 & 26 Vict. c. 63, s. 54, and 24 Vict. c. 10, s. 13. The *Hesperia* does not now contest the right to the limitation of liability, but claims interest on the amount as limited, and her costs. The *Northumbria* does not oppose the payment of costs, and the questions before me now are admitted to be these: first, whether any interest be payable on the limited amount; and if so, secondly, from what period interest is to be reckoned.

It is not denied that the practice of this Court has been invariable as to allowing interest; but it is contended that this practice is erroneous, at variance with the common law both before and since the passing of the statute 3 & 4 Wm. 4, c. 42, and moreover opposed to the enactments of the Merchant Shipping Act Amendment Act, 1862. I was referred to the case of *Higgins* v. *Sargent* (2), and to 1 Chitty on Pleading, 7th ed. p. 412, to shew that no interest was allowed at common law in cases of contract, with certain exceptions, or in cases of tort; and that it was not till 3 & 4 Wm. 4, c. 42, was passed, that in certain actions the jury could give damages in the nature of interest, and that in these instances the wrongdoer had not destroyed, but taken possession

(1) 16 L. T. (N. S.) 452.

(2) 2 B. & C. 348.

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of the goods; and, therefore, the legislature allowed interest to be recovered.

If it were necessary to examine this proposition, I should find it difficult to reconcile it with the recent case of *British Columbia Saw Mill Company* v. *Nettleship*. (1) But it appears to me quite a sufficient answer to these authorities to say, that the Admiralty, in the exercise of an equitable jurisdiction, has proceeded upon another and a different principle from that on which the common law authorities appear to be founded. The principle adopted by the Admiralty Court has been that of the civil law, that interest was always due to the obligee when payment was not made, ex morâ of the obligor; and that, whether the obligation arose ex contractu or ex delicto. The American common law has been more liberal than the English; Mr. Sedgwick, in his work on damages (4th ed.), p. 443, remarks: "There is considerable conflict and contradiction between the English and American cases on this subject. But as a general thing, it may be said that while the tribunals of the former country restrict themselves generally to those cases where an agreement to pay interest can be proved or inferred, the courts of the United States, on the other hand, have shewn themselves more liberally disposed, making the allowance of interest more nearly to depend on the equity of the case, and not requiring either an express or implied promise to sustain the claim."

I have now to consider whether the practice of the Court has been affected on this point by the limitation of liability Acts. In the case of *The Dundee* (2), Lord Stowell decided that the statute 53 Geo. 3, c. 159, s. 1, limiting the liability of owners to the value of the ship, appurtenances, and freight, applied only to the original claim for damage, and did not extend to costs and interest. The words of the statute on which Lord Stowell gave his decision were substantially, and for the purposes of this case, the same as those of the Merchant Shipping Act Amendment Act, 1862, the statute invoked on this occasion, unless the words in the 54th section, "shall not be answerable in damages" (which are identical with those of the Merchant Shipping Act, 1854, s. 504) constitute a difference.

The contention is that interest is part of the damages, and that

(1) Law Rep. 3 C. P. 499. (2) 2 Hagg. Adm. 137.

therefore the Court is precluded by the statute from giving it, in addition to the statutory limitation of 8*l.* per ton. The answer to this contention appears to me conclusive: first, if it were necessary, I should be inclined to dispute the axiom, but, in truth, the application of it is at variance both with the decided cases in the Court of Chancery as well as in the Court of Admiralty, and with the principle on which they are founded; that principle being, that the lien attaches from the moment when the injury has been inflicted. The cases are, in the Court of Chancery, *African Steam Ship Company* v. *Swanzy* (1), decided in 1856; *General Iron Screw Collier Company* v. *Schurmanns* (2), decided in 1860; and *Nixon* v. *Roberts* (3), decided in 1861. All these cases were decided upon the provisions of the Merchant Shipping Act, 1854, s. 504; and I think it was well remarked by Mr. Clarkson, that the legislature, when it passed the subsequent Merchant Shipping Act of 1862, must be taken to have been aware of these decisions; and in this last Merchant Shipping Act the words of the former Act, "shall not be answerable for damages," are repeated, without any provision that they shall not be deemed to include interest. The cases under this last Act are *Straker* v. *Hartland* (4), in the Court of Chancery, decided in 1864; and *The Amalia* (5), in the Court of Admiralty, the best report of which appears to be contained in the New Reports. (6) In all the cases in the Court of Chancery it is to be observed, that they have avowedly followed the practice of the Court of Admiralty. I arrive, therefore, without hesitation, at the conclusion, that notwithstanding the Merchant Shipping Acts, some interest is payable on the limited amount. I entirely agree with the observations of Wood, V.-C., in *Straker* v. *Hartland* (7): "It was quite clear that justice required that a debt which was due, but the payment of which was delayed, should carry interest."

The important question remains to be considered, as to which, perhaps, there may be more doubt, namely, the period from which the interest is to be reckoned. In order to arrive at a clear understand-

(1) 2 K. & J. 660; 25 L. J. (N. S.) Ch. 870.
(2) 29 L. J. (Ch.) 877.
(3) 30 L. J. (Ch.) 844.
(4) 34 L. J. (Ch.) 122.
(5) 34 L. J. (P. M. & A.) 21.
(6) 5 N. R. 164, note.
(7) 34 L. J. (Ch.) at p. 123.

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ing on this point, it is necessary to consider the practice under the old law, and the practice since the statutes which limit a defendant's liability. The practice under the old law, which decreed a restitutio in integrum by the wrongdoer to the sufferer, was as follows. In the case of a vessel sunk with a cargo on board, the restitutio in integrum was effected by a calculation of the probable value of the ship at the end of her voyage, and of the freight which she would have earned, making at the same time certain deductions as to the expenses which the owners must have incurred in order to complete the voyage, such as the wages of the crew, &c., and also making a deduction for discount if the value found were paid before the probable end of the voyage, and, e converso, giving interest on the value if not paid until after the probable end of the voyage. In the event of the vessel sunk having no cargo, then interest upon the value of the ship from the day of the collision was given; the reason being, that in the former case, by giving freight you had really given the interest on the use of the vessel during the interval between the collision and her arrival in port; whereas, in the case of there being no cargo, there was no freight to represent the interest, and it was therefore expressly given. So that, in the first case, to have given interest as well as freight would have been to place the sufferer in a better position than he would have been but for the collision; and, in the second case, to have refused him interest would have been to place him in a worse position on account of the collision than he would otherwise have been; whereas, the principle of restitutio in integrum is to replace the sufferer in the condition in which he was at the time when the wrong was done.

The question is, how are these principles affected by the statutes which limit the liability of the wrongdoer. In these statutes the legislature introduced a new principle, the object of which was to give some protection to the owner against the wrongdoing of his servant, the master of the vessel. They preserved the principle of restitutio in integrum in cases where, with his actual fault and privity, the damage had been inflicted on the sufferer; but with this exception, they limited his liability to a certain definite sum. In the latter case, therefore, this limited amount took the place of the restitutio in integrum; but the principle still remains, that the

liability to this amount attaches from the time of the collision; and there seems no reason why interest should not accrue on the delay to pay that limited amount, as well as in the case where the amount is unlimited. Indeed, the equity of the thing is the other way, for to refuse this interest would be to diminish still further the natural right of the sufferer to full compensation for the injury which he has sustained. It is to be observed that the sufferer does not, where interest is awarded, obtain interest on the amount of his damage, but on the limited amount, or on his share of the limited amount, to which the statute has restricted the liability of the wrongdoer. In the case of a vessel without cargo being sunk, it is clear that the interest would date from the time when the liability attached, that is, from the moment of the collision. Nor, when the case is examined, does it appear that a different rule ought to apply when the vessel carries cargo. Under the rule of restitutio in integrum the cargo-carrying vessel did not obtain interest from the date of the collision, because she received it in the shape of freight at the port of delivery; but where the amount of the liability is limited, and the sufferer does not receive full compensation, the reason which fixes the date of the probable arrival at the port of delivery as the date from which interest shall run does not apply. In the case of *The Amalia*, Dr. Lushington remarked (1): "Upon what grounds, then, was interest given? Interest was not given by reason of indemnification for the loss, for the loss was the damage which had accrued; but interest was given for this reason, namely, that the loss was not paid at the proper time. If a man is kept out of his money, it is a loss in the common sense of the word, but a loss of a totally different description, and clearly to be distinguished from a loss which has occurred by damage done at the moment of collision." This case was cited as an authority for the opposite opinion, but in truth it is not so; the judge in that case gave all that was prayed, and no decision on this point was involved in his judgment. With respect to some of the earlier cases in Chancery, it would seem from the form of the decree, that a distinction was taken between vessels with or without cargo, but the point seems never to have been adjudicated upon; and in the later cases the practice of the Court of Admiralty appears to have

(1) 5 N. R. 164, n.; 34 L. J. (P. M. & A.) 21.

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been followed; and that practice, I learn from the registrar, has for some time been to treat the date of collision as the period from which interest accrues, without discrimination whether the vessel has or has not carried cargo. No such discrimination was attempted to be made, either in the case of *The Spirit of the Ocean* (1), or in the more recent case of *The City of Buenos Ayres.*

I am of opinion that, in all cases where the liability of the owner is limited, interest should be given upon the limited amount from the date of the collision; and I decree in this case accordingly.

Solicitors for plaintiffs: *Hillyer & Fenwick.*

Solicitors for owners of the *Hesperia: Lowless & Nelson.*

Solicitors for owners of cargo ex *Hesperia: Waltons, Bubb, & Walton.*

Nov. 17.

THE BENGAL.

County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *s.* 9—*Order to take proceedings in the High Court of Admiralty.*

Part 503.

In pursuance of the 9th section of the County Courts Admiralty Jurisdiction Act, 1868, application may be made to the Court of Admiralty for an order to institute in that court proceedings which might have been taken without agreement in a county court, and the Court of Admiralty will, if it sees fit, make such order.

E. C. Clarkson applied, in pursuance of the 9th section of the County Courts Admiralty Jurisdiction Act, 1868, for an order to institute a suit in the High Court of Admiralty. The application was made on behalf of the owners of two steam tugs, who claimed to have rendered salvage services to the *Bengal,* a vessel of 1300 tons burden. The application was supported by an affidavit, from which it appeared that agreements had been made between the masters of the tugs and the master of the *Bengal* to tow the *Bengal* into port for a specific sum; that, after the making of the agreement, the difficulty of the enterprise had increased; and that a question of law was likely to arise whether, under the circumstances of the case, the towage contract was superseded by the right to salvage.

THE COURT made the order.

Proctors for plaintiffs: *Lowless & Nelson.*

(1) Brow. & Lush. 336.

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Practice—Tender—Costs.

The defendant in a cause may, by act in court, tender a sum of money in satisfaction of the plaintiff's claim, and reserve the question whether he is liable to pay costs.

Pow 504

THIS was a cause of salvage instituted by the owners, master, and crew of the screw steamship *Zingari*, to recover reward for salvage services rendered by the *Zingari* to the *Hickman*, a schooner of 98 tons register. The *Zingari*, a screw steamer of 405 tons burden, with engines of 70-horse power, manned by a crew of fourteen hands all told, and laden with cargo, left Hull on the 2nd of April for Yarmouth. At about 6 A.M. on the following day the *Zingari* was about seven miles south of the Dudgeon light-ship, when those on board her sighted the *Hickman*. A few hours before the *Hickman*, whilst on a voyage from London to Hull with cargo, had been struck by lightning, both her masts and her jib-boom were carried away, and her steering gear was injured by the falling spars. The *Hickman*, at the time she was sighted by the *Zingari*, was riding at anchor. The Zingari bore down to the *Hickman* and took her in tow, and towed her to Yarmouth Roads, where the vessels arrived about 2 P.M. the same day. The *Hickman* was taken by a tug into Yarmouth harbour. The plaintiffs alleged that, at the time the *Hickman* was taken in tow, the wind was blowing in strong squalls, a heavy sea was running, and the Hickman was rolling heavily and taking in frequent seas over all; that the *Zingari* incurred considerable risk, and her master and crew were exposed to danger in the performance of the salvage service. These allegations the defendants denied, and they alleged that the plaintiffs' statement of the services of the *Zingari* was highly coloured and exaggerated. The defendants further alleged that when the *Zingari* came up a vessel called the *Swaledale* was in the service of the *Hickman*, and was preparing to take her to Yarmouth, which she could and would have done had not the *Zingari* been engaged in her stead. The value of the *Hickman* was agreed by the proctors on both sides to be 650*l.*, and the value of her cargo 1603*l.*

After the institution of the cause, the defendants, on the 16th of

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April, by act in court, tendered 250*l.* "and costs (if any) due by law." On the 19th of June the defendants, by act in court, made a further tender of 32*l.* "with costs (if any) due by law." On the 24th of June the plaintiffs' proctor wrote to the defendants' proctors a letter in the following terms:—

"In reference to the tender last made by you, I will observe, that although I consider it insufficient, and, as a condition is attached to the payment of costs, no tender at all, yet I am inclined to advise my clients to accept it if your clients will pay their costs up to the present time.

"I will advise my clients to this course in order to save further expense, and to get the matter settled and disposed of.

"I shall use this letter hereafter in any way that I may think fit in the interests of my clients."

The defendants' proctors wrote in answer:—

"We are at a loss to conceive in what respect our tender is illegal, and are quite prepared to support and abide by the form in which it is made."

The defendants, in the answer filed on the 30th of June, pleaded that they had tendered to the plaintiffs for their services sums amounting to 282*l.* The cause was heard on the 17th day of November, when the Court, upon the evidence, decided that the sum of 282*l.* was a sufficient remuneration for the services rendered by the plaintiffs. The question was then raised, whether the plaintiffs were entitled to their costs of suit.

Nov. 17. *The Admiralty Advocate* (*Dr. Deane, Q.C.*), and *Gibson*, for the plaintiffs. The defendants can derive no benefit from the tenders. The Court can regard tenders only when they are made in regular form. According to the established practice of the Court, a tender must include a tender of costs up to the time of tender. A tender to which a condition is annexed is no tender at all: *The Vrouw Margaretha* (1); *The John* (2); *The Sovereign* (3); *The Comte Nesselrood.* (4) The defendants have taken the chance of escaping the payment of costs, and yet they seek to place

(1) 4 C. Rob. 103.
(2) Lush. 11.
(3) Lush. 85.
(4) Lush. 454.

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themselves in as favourable a position as if they had tendered costs.

The circumstances of the case are such that the Court will certify, in accordance with the provisions of the 9th section of the County Courts Admiralty Jurisdiction Act, 1868, that the cause was a proper cause to be tried in this court.

Milward, Q.C., and *E. C. Clarkson*, for the defendants. It is not necessary to the validity of a tender to offer any costs at all. The tender is made in respect of the salvage services only, and the defendant is entitled to tender without prejudice to the question of costs: Williams and Bruce's Admiralty Practice, p. 258, note (*c*). Because the plaintiffs are entitled to salvage reward, it does not follow that they are justified in resorting to this Court to enforce their claim. The tenders are in the form in constant use in this court. Tender in this court, by act in court, is like payment into court at common law. At common law, a plea of payment into court omits all notice of costs: Common Law Procedure Act, 1852, s. 73; Reg. Gen., Hil. Term., 1853, r. 12. The rule laid down in the case of *The Vrouw Margaretha* (1) amounts only to this, that the plaintiffs shall have due warning that the sum tendered is exclusive of costs.

The cause ought not to have been brought in this court, and the Court should refuse to give a certificate to entitle the plaintiffs to costs.

Cur. adv. vult.

Nov. 23. SIR ROBERT PHILLIMORE. This is a case of salvage in which I pronounced the tender, or rather the two tenders taken together, to be sufficient. They amounted to 282*l.* Two questions were reserved for the further consideration of the Court.

First: Whether, the sum awarded being under 300*l.*, the Court, having regard to ss. 3 and 9 of the County Court Admiralty Jurisdiction Act, 1868, ought to certify for costs. I have considered all the circumstances of this case, and especially, though not solely, the small difference between the sum awarded and that which limits the jurisdiction of the county court; and I am of opinion that I ought to certify for costs.

Secondly: Whether, although the suit has been properly insti-

(1) 4 C. Rob. 103.

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tuted in this court, the plaintiffs ought to have their costs, inasmuch as I have pronounced for the sufficiency of the tender.

The form of the tenders was as follows:—"Take notice that we have this day paid to the account of the registrar at the Bank of England the sum of *l.*, which we tender, together with such costs as may be due by law . . . ." Cases were cited to me with respect to the chancery and common law courts on questions of tender; but I cannot consider these as furnishing precedents for the practice of this court. Various cases on the subject of tender decided in this court were also referred to in the course of the argument. They will all be found collected in chap. 5 of Williams and Bruce's Admiralty Practice; which also contains in the notes some valuable remarks upon the principle of tender in this court. The first decision of any importance is that of Lord Stowell in the case of *The Vrouw Margaretha* (1), decided in 1801. The rule which Lord Stowell intended to lay down in that case was, that the parties ought to know "what is proposed to them for their reward and what for costs;" and that, inasmuch as verbal offers had led to misunderstanding and uncertainty, a more regular and legal form should be adopted for the future. Since that time the matter was several times discussed before my predecessor in this chair. But upon the whole, I am of opinion that the practice on this point has been somewhat wavering and uncertain; and I agree with the observations made at the bar, that it is expedient to take this opportunity to lay down a rule on the subject. With respect to the present case, I am of opinion that it was competent to the defendant to tender the reward for salvage, and reserve the question of costs; and such was clearly the intention of the tender; and I think it would have been competent to the plaintiffs to have accepted the tender, so far as it related to the reward, and to have reserved the question of costs for the consideration of the Court.

I shall give the plaintiffs their costs up to the time when the second tender was made; but having regard to the uncertainty as to the practice, and to the correspondence between the solicitors of the parties, which has been put in evidence, I shall make no order as to costs subsequent to the tenders, but leave both parties to pay their own costs.

(1) 4 C. Rob. 103.

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For the future I must direct that, when a tender is made, it shall either include an offer to pay costs up to the time of tender; or it shall state that the tender relates to the claim only, and shall specify the ground upon which costs are not tendered, and refer the question of costs to the consideration of the Court.

Proctor for plaintiffs: *H. C. Coote.*

Proctors for defendants: *Deacon, Son, & Rogers.*

THE OFFICE OF THE JUDGE PROMOTED BY THE BISHOP OF WINCHESTER AGAINST WIX.

Nov. 18.

Practice—Resignation of Office by Promoter—Amendment.

A cause having been sent to the Arches Court by letters of request, from the Bishop of Winchester in the first instance, the letters of request were accepted by the judge of the Arches Court. A decree by letters of request issued, calling upon the defendant to appear, and the defendant appeared. Afterwards, the Bishop of Winchester, who was the promoter of the cause, resigned his see:—

Held, that the cause had not abated, and that it might be continued at the suit of the same promoter in his individual capacity on the title of the cause being amended.

Post 4 P.D. 54.

THIS was a cause sent in the first instance to the Court of Arches, under the provisions of the Church Discipline Act (3 & 4 Vict. c. 86), by letters of request, dated the 14th of May, 1869, signed by the then Bishop of Winchester, the voluntary promoter of the cause. In compliance with the letters of request, the defendant was served with a decree of the Court of Arches, citing him to enter an appearance in that court to answer certain articles to be administered to him for having offended against the laws ecclesiastical. On the 13th of July the defendant's proctor entered an appearance in the Arches Court on his behalf, and prayed articles, and on the 17th of the same month, articles were brought in and admitted. After the articles were brought in and admitted, the said Bishop of Winchester duly and canonically resigned his see. His resignation was, on the 28th of October, 1869, accepted by the Archbishop of Canterbury, his ecclesiastical superior. On the 11th of November, 1869, the Queen, by an order in council, declared the see of Winchester to be vacant.

The above facts were stated in an act on petition brought in by

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the defendant. The act on petition, which was dated the 12th of November, 1869, further alleged that the see of Winchester was then vacant, and that by reason of the resignation of the Bishop of Winchester and of the said see being vacant, the cause had abated and come to an end, and prayed that the defendant might be dismissed from the further observance of justice in the cause.

The proctors for the promoters, in their answer to the act on petition, denied that by reason of the resignation of the late Bishop of Winchester and of the said see being vacant, the cause had abated and come to an end, and prayed the Court to reject the prayer of the defendant and to order the title of the cause to be amended by describing the promoter as the Right Rev. Charles Sumner, D.D., late Lord Bishop of Winchester.

A. Charles, for the defendant. The question is, whether the promoter instituted this suit in his individual or his episcopal capacity? It was by virtue of his episcopal capacity that he promoted this suit, and now that he has resigned the see the effect upon the proceedings is the same as if he were dead. It is essential to the validity of proceedings in this court that there should be two parties before it, a promoter and a defendant. The proceedings are litigious, not inquisitorial. In this respect the proceedings here resemble proceedings at common law. By the common law a suit instituted by a bishop abated by his resignation: Comyn's Digest, tit. Abatement, H. 46. The procedure at common law in this respect has been altered in modern times by various statutes, but the statutes do not apply to this court. Whatever view the Court may take of the question, it is clear that the title of the cause must be amended, and it is in the discretion of the Court to amend or not. In the exercise of its discretion the Court should not amend. The cause has been sent here in the first instance. It is possible that the circumstance that the late bishop was the promoter of his own office may have induced him to adopt this course. Had the suit been promoted by a private person the bishop might have instituted a commission, and that might have been more beneficial to the defendant. Now, that the promoter has resigned his office of bishop, and become a private person, why should the defendant be deprived of the possible advantage he

might have derived had such a state of things existed at the time of the institution of the suit?

Dr. Deane, Q.C., and *Dr. Tristram*, for the promoter. The rules of common law procedure do not and never did apply to this court. The promoter instituted this suit in his individual capacity. It is true the suit was sent here by the bishop in his episcopal capacity, by letters of request, but as soon as the letters of request were accepted by this court the bishop was functus officio: *Maidman* v. *Malpas*. (1) This court being seised of the cause the question is, whether there is any one properly before the Court to promote the office of the Court. Dr. Sumner, the late Bishop of Winchester, was, and still is, the promoter of this suit. At the time of the institution of the suit he was described as the Bishop of Winchester, but it was not necessary to him in his capacity of promoter that he should be Bishop of Winchester. Any private person might have promoted the suit. All that is necessary is, that the Court should allow a formal amendment to be made in the description of the promoter.

SIR ROBERT PHILLIMORE. The question raised in this cause is novel in practice, and the registrar, after a very careful search, has been unable to find any direct precedent; but it is not difficult to decide according to principle. The clear and able argument of Mr. Charles was founded upon the presumption that this court would proceed according to certain analogies of the common law. But I must recollect the observation made by Lord Wensleydale, delivering the judgment of the Privy Council in the case of *Sherwood* v. *Ray* (2), that the proceedings of the ecclesiastical courts are not governed by the rules of the common law, or any analogies which they furnish. I am certainly not inclined to follow the analogy of those rules, which were in force before the system of common law procedure had been subjected to the reformation which it has since undergone. I must dismiss these analogies altogether from my consideration.

It is necessary to consider carefully the course of proceedings in this case. The letters of request had been duly sent to this court; the Court had accepted those letters, and issued process to bring the accused party before it; and the accused party had appeared,

(1) 1 Hagg. Consist. 205, 208. (2) 1 Moo. P. C. at p. 397.

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and was properly before the Court prior to the time when the late Bishop of Winchester resigned his see. In the first instance it rested with the late Bishop of Winchester, in the exercise of his episcopal office, to determine whether the suit should proceed or not, and in what manner; he was invested with a discretionary power to cause his office to be promoted before himself, or to send the case by letters of request to be heard before this court, either appointing a private person (his secretary, for instance) to carry on the proceedings in his own name, or by appearing himself as a voluntary promoter of the office of the judge. He has exercised his discretion by adopting the latter course. This discretion he had exercised before he resigned his see, and as soon as this court became properly in possession of the cause, the bishop in his official capacity had no longer any control over the proceedings. It is true that the late bishop is the promoter of this cause, but as I have said, a private person might, with his sanction, have acted as the promoter. The promoter of the office of this court must not be confounded with the promoter of the office of the Bishop of Winchester. The cause being now in this court, it is the office of the Archbishop of Canterbury, acting through this court, that is being promoted. When this is borne in mind, the question now raised appears to be one of extreme simplicity. It is this, whether the promoter having by reason of his resignation of the see of Winchester ceased to bear the designation or title which he bore when he first instituted this suit, the Court shall allow the suit to proceed with the alteration in the title of it which is thus rendered necessary, and which is now prayed for by the promoter. I am of opinion the Court must allow the suit to proceed with the alteration of the title of the promoter. I doubt whether I have any discretion in the matter, but if I have a discretion, I am certain I ought not to allow (having regard to the principles which govern the practice of this court) a technical objection of this kind to prevail. I must dismiss the defendant's petition. I order the title of the cause to be amended according to the prayer of the promoter. A new proxy must be given in Bishop Summer's own name.

Proctors for promoter: *Moore & Currey.*
Proctor for defendant: *Brooks.*

THE MEMPHIS.

1869
Nov. 23.

Practice—Inspection of Documents—Costs.

Before moving the Court for an order for inspection of documents, previous application should be made to the parties in possession of them; unless the applicant does so he may be condemned in costs.

THIS was a cause of salvage. The plaintiffs alleged that in the performance of the salvage services their vessel had been obliged to deviate from her course, and relied upon the possible risk in respect to the vacation of policies of insurance, &c., as an ingredient to be considered by the Court in fixing the amount of salvage remuneration.

W. G. F. Phillimore, on behalf of the defendants, moved for an order for the inspection of the policies of insurance on the plaintiffs' ship, and the bills of lading.

E. C. Clarkson, on behalf of the plaintiffs, did not oppose the application so far as it related to documents in the possession of the plaintiffs, but asked that the defendants should be ordered to pay the costs of the motion, on the ground that the motion was unnecessary, as the defendants had made no previous application to the plaintiffs for leave to inspect.

SIR ROBERT PHILLIMORE. The defendants must be allowed to inspect such of the documents as are in the possession of the plaintiffs, but I must condemn the defendants in the costs of the motion. I wish it to be understood that the Court will follow this rule as to costs in all cases where a motion is made for leave to inspect documents in the possession of a party who has not been previously requested to allow inspection.

Proctors for plaintiffs: *Clarkson, Son, & Greenwell.*
Proctors for defendants: *Pritchard & Sons.*

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Dec. 21.

THE NORTHUMBRIA.

Jurisdiction—Suit for Limitation of Liability—The Admiralty Court Act, 1861 (24 *Vict. c.* 10), *s.* 13.

Where proceedings in rem have been instituted in the Court of Admiralty against a vessel, and bail has been given for the vessel, the Court has jurisdiction to entertain a suit instituted by the owners of the vessel for limitation of liability, although the vessel may not actually have been under arrest of the Court of Admiralty.

On the 20th of August, 1869, the *Northumbria* came into collision with the *Hesperia*, and the *Hesperia*, which was laden with cargo, shortly afterwards sunk. On the same day a suit of damage (numbered 5032) was instituted by the owners of the *Hesperia* against the *Northumbria*, and a præcipe for caveat warrant was filed in the registry by the solicitors for the owners of the *Northumbria*. The præcipe for caveat warrant was signed by the solicitors for the owners of the *Northumbria*, and was in the following form :—

"We, Hillyer & Fenwick, solicitors, No. 12, Fenchurch street, in the city of London, hereby undertake to enter an appearance in any cause that may be instituted in the High Court of Admiralty of England against the screw steamer *Northumbria*, her tackle, apparel, and furniture, and within three days after we shall have been served with a notice of the institution of such cause, to give bail therein in a sum not exceeding the value thereof, or to pay such sum into the registry. And we consent that all instruments and other documents in such cause may be left for us at No. 12, Fenchurch street, London."

On the 25th of August a suit of damage (numbered 5036) was instituted on behalf of the owners of part of the cargo laden on board the *Hesperia*. The owners of the *Northumbria* appeared, and gave bail in both these suits in pursuance of the undertaking contained in the præcipe for caveat warrant. The owners of the *Northumbria* having instituted a suit (numbered 5035) for limitation of liability, the plaintiffs in the damage suits appeared as defendants in the suit for limitation of liability. The suit for limitation of liability came on for hearing on the 9th of November, and the only question then raised before the Court was whether

the owners of the *Northumbria* were liable to pay interest on the value of their vessel, estimated at 8*l.* per ton from the date of the collision. The Court on the 23rd of November decided this question in the affirmative, and granted the prayer of the plaintiffs on condition that they paid certain costs, and paid into the registry money sufficient to cover the value of the ship estimated at 8*l.* per ton, together with interest from the date of the collision. (1) The plaintiffs proceeded to carry out the decree in the usual manner, and applied in the registry for the issue of advertisements. In the registry an objection was taken on the ground that the *Northumbria* had not been under arrest of the Court of Admiralty. (2)

Dec. 7. *Butt, Q.C.* (*D. F. Steavenson* with him), on behalf of the plaintiffs in the suit for limitation of liability, moved the Court to direct advertisements to issue in the suit pursuant to decree pronounced on the 23rd of November, notwithstanding that the *Northumbria* was not under actual arrest at the time the suit was instituted.

The object of the provisions of the 13th section of the Admiralty Court Act, 1861, is to enable this Court to entertain a suit for limitation of liability whenever it is seized of the property to which the proceedings relate. The *Northumbria* has not been arrested because bail was given, but the bail represents the ship; and the Court is really, to all intents and purposes, as much seized of the property as if the ship had been actually arrested.

E. C. Clarkson, for the owners of the *Hesperia*, the plaintiffs in suit 5032.

G. Bruce, for the owners of part of the cargo laden on board the *Hesperia*, the plaintiffs in suit 5036.

(1) The case is reported ante, p. 6.

(2) The Merchant Shipping Act, 1854, part 9, s. 514, provides in effect that where any liability has been incurred by any owner in respect of damage to ships or goods, and several claims are to be apprehended in respect of such liability, it shall be lawful for the Court of Chancery to entertain proceedings at the suit of the owner, for the purpose of determining such liability and distributing the amount due rateably amongst the claimants.

s. 13 of the Admiralty Court Act, 1861 (24 Vict. c. 10), enacts, "Whenever any ship or vessel, or the proceeds thereof are under arrest of the High Court of Admiralty, the said court shall have the same powers as are conferred upon the High Court of Chancery in England, by the ninth part of the Merchant Shipping Act, 1854."

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They consented on behalf of their clients to the motion, but stated that there were other persons, owners of cargo laden on board the *Hesperia*, who might prefer claims against the *Northumbria*, and whose consent could not be obtained.

Cur. adv. vult.

Dec. 21. SIR ROBERT PHILLIMORE. This case has been before me upon another occasion, when I gave a decision upon another question as to the period from which interest should accrue from the wrongdoing to the suffering vessel in a suit for limitation of liability; since which a doubt has been raised as to whether the Court had jurisdiction in this matter, inasmuch as the vessel was not, in the technical sense of the word, under arrest at the time when the limitation suit was instituted. The 13th section of the Admiralty Court Act, 1861, enacts that, "whenever any ship or vessel or the proceeds thereof are under the arrest of the High Court of Admiralty, the said court shall have the same powers as are conferred upon the High Court of Chancery in England by the ninth part of the Merchant Shipping Act, 1854." The same expression "under arrest," is used in other parts of the statute, and in 3 & 4 Vict. c. 65. Now in the present case the vessel has not been under arrest, because the owners, under rule 55 of this court, caused a caveat against the issue of a warrant to be entered in the registry. In order to have this caveat entered, the solicitors of the owners filed a præcipe for caveat warrant, which I will read:—[The judge here read the præcipe for caveat warrant.] Bail having been given in pursuance of the undertaking contained in this præcipe, the formal warrant of arrest became unnecessary. Stripped of technical language, the plain meaning of this is, the defendant says to the plaintiffs, "Don't arrest my ship, I will consent to give that bail which would have released my ship if the warrant had been served upon her."

There can be no doubt, I think, what was the intention of the legislature in the section to which I have referred; namely, that, whenever the Court was seized of the "res," the jurisdiction as to limitation of liability should attach. The bail is the representative of the "res," and to all intents and purposes the Court is as much seized of the proceeds as if the "res" itself had been under warrant of arrest and released.

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According to the old practice, the jurisdiction of the Court of Queen's Bench was in certain cases only founded on the fact of the defendant being in the custody of its marshal; but this principle was holden to be satisfied by the defendant's appearance or by his putting in bail, "for," as Mr. Smith observes, "in those cases, though not in the *real*, he was in the constructive custody of the marshal" (Action at Law, ed. 1857, p. 7). And surely in the case before me the "res" is in the constructive, though not in the real, custody of the marshal of this court. But even if this analogy be unsound, which it does not appear to me to be, I should still be of opinion that, looking to the whole scope and tenor of the Act, this Court was intended to have jurisdiction in suits of this description, when it is in possession of the bail which represents the "res," whether the "res" has been released on the giving of bail after the arrest, or whether the arrest has been prevented, as in this instance, by such a caveat as has been issued in this case.

Solicitors for owner of the *Northumbria*: *Hillyer & Fenwick.*

Solicitors for owners of the *Hesperia*: *Lowless & Nelson.*

Solicitors for owners of cargo ex *Hesperia*: *Waltons, Bubb, & Walton.*

THE PRINCESS ROYAL.

Dec. 21.

Amendment—Statement of the Nature of the Cause in the Præcipe to institute.

SPC 145

The plaintiffs in a suit in rem in the præcipe to institute stated the cause to be a "cause of damage to cargo." The affidavit to lead warrant alleged that plaintiffs had sustained damage by breach of duty and breach of contract on the part of the master and crew of the ship proceeded against. After the arrest of the ship and appearance entered on behalf of her owners, the plaintiffs applied for leave to amend the statement of the nature of the cause of action by striking out of the præcipe to institute the words "damage to cargo."

The Court granted leave to the plaintiffs to strike out these words, and to substitute the words "breach of duty and breach of contract on the part of the master and crew" on payment of the costs occasioned by the mis-statement.

On the 24th of November, 1869, a cause was instituted on behalf of the owners of the cargo of the *Princess Royal* against the *Princess Royal* and her freight. In the præcipe to institute the cause was stated to be "a cause of damage to cargo." At the

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time the cause was instituted an affidavit to lead warrant was filed. The affidavit stated that the plaintiffs had sustained considerable damages by the breach of duty and breach of contract on the part of the master and crew of the *Princess Royal*, and that no owner or part owner of the vessel was domiciled in England or Wales. A warrant was forthwith issued, and the ship was arrested on the 25th of November. On the 29th of November an appearance was entered on behalf of the owners of the *Princess Royal*.

Dec. 11. *H. H. Shephard*, on behalf of the plaintiffs, moved to amend the præcipe to institute by striking out the words "damage to cargo." He cited *The Skipwith*. (1)

[SIR ROBERT PHILLIMORE. What words do you propose to substitute?]

I need not substitute any; in the present case it is not necessary to state the nature of the cause in the præcipe to institute. This is a cause instituted under the 6th section of the Admiralty Court Act, 1861, as the affidavit to lead warrant shews; no authoritative description has been established for causes instituted under this section, and it is not an uncommon practice to institute causes of this kind without inserting in the præcipe to institute any statement of the nature of the cause.

[SIR ROBERT PHILLIMORE. Does not the form of the præcipe to institute annexed to the rules, orders, and regulations, require that the nature of the cause should be stated in the præcipe to institute?]

If necessary, I will amend the form of motion and ask to substitute the words "breach of duty and breach of contract on the part of the owner, master, or crew of the ship." Those are words used in the 6th section of the Admiralty Court Act, 1861.

W. G. F. Phillimore, for the defendants. The original motion, as it stood, was wholly improper, but if the Court grants this application in the form in which it is now put by counsel, it will order the plaintiffs to pay the costs of the cause up to the present time. Until now the whole proceedings have been irregular. A suitor cannot avail himself of the process of this court to arrest a ship, unless in the præcipe to institute he states the nature of

(1) 10 Jur. (N. S.) 445.

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the cause of action in respect of which he arrests her. The Court of Chancery has laid down very stringent rules with reference to the writ of ne exeat regno, and this court should not be less careful to prevent the abuse of its process: Daniel's Chancery Practice, 4th ed., p. 1536. If the plaintiff in a cause arrests property he does so at his peril. The ship proceeded against has been arrested in a cause of damage to cargo, and now it is practically admitted that there is no cause of action in respect of damage to cargo.

SIR ROBERT PHILLIMORE. The cause of action has been properly stated in the affidavit, which is called the "affidavit to lead warrant," and all that the plaintiffs now by this motion as amended ask leave to do, is to amend "the præcipe to institute," so as to make it correspond with the affidavit to lead warrant. I grant leave to the plaintiffs to amend the præcipe by striking out the words "damage to cargo" and substituting the words "breach of duty and breach of contract on the part of the owner, master, or crew." The plaintiffs must pay the costs occasioned by the misstatement of the cause of action in the præcipe to institute.

Proctor for plaintiffs: *Stokes.*
Proctor for defendants: *Barker.*

THE LADY OF THE LAKE.

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Jan. 18.

Co-owners—The Admiralty Court Act, 1861 (24 *Vict. c.* 10), *s.* 8.

The plaintiff and defendant were co-owners of a ship. The plaintiff sold his share in the ship to a third person, and afterwards instituted a suit in rem in the Court of Admiralty to have an account taken between himself and the defendant in relation to the employment and earnings of the ship during the time he and the defendant were co-owners:—

Held, that as the suit related to questions which arose between the plaintiff and defendant while they were co-owners the Court had jurisdiction to entertain the suit, notwithstanding the plaintiff had ceased to be a co-owner at the time of the institution of the suit.

THIS was a suit in rem instituted under the 8th section of the Admiralty Court Act, 1861. The petition alleged that on the

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18th of July, 1868, the plaintiff, who was then the sole owner of the barque *Lady of the Lake*, sold to the defendant 32-64th shares of the barque; that the vessel afterwards sailed under the defendant's command on a foreign voyage; that on her return home on the 9th of August, 1869, questions arose between the plaintiff and defendant touching the employment and earnings of the barque, and that accounts were outstanding and unsettled between the plaintiff and defendant in relation thereto. The prayer of the petition was as follows:—"Wherefore the said proctors pray the Right Honourable the Judge to refer the accounts to the registrar, and to direct that the defendant's 32-64th shares of the barque be sold, to pronounce for such amount as may be found due from the defendant to the plaintiff, to condemn the defendant in the costs of the suit, and that otherwise right and justice may be administered in the premises."

It appeared from the petition that the plaintiff sold the other 32-64th shares of the barque to another person on the 31st of August, 1869, a date prior to the institution of the suit.

Clarkson, on behalf of the defendant, moved the Court to reject the petition on the ground that the plaintiff was not a co-owner at the time of the institution of the suit. The 8th section of the Admiralty Court Act, 1861, confers jurisdiction upon the Court to settle accounts only in cases where the suit is instituted to settle accounts between persons who are co-owners at the time the suit is instituted. In proceedings of this kind there must be mutuality. According to the practice in the Court of Chancery, a plaintiff praying for an account himself submits to account: Seton on Decrees, c. 2, s. 1. When the accounts are taken it may be found that there is a balance in favour of the defendant. But the defendant has no security for the payment of such balance as may be found to be due to him. The plaintiff has security for the payment of whatever may be found due to him, for he has arrested the ship, half of which belongs to the defendant; but he has parted with his own interest in the ship, and so deprived the defendant of the means of obtaining security.

Cohen, contrà. The 8th section confers jurisdiction wherever the relation of co-ownership exists between the parties at the time

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the cause of action accrued. Can it be said that a master who has earned wages on board a ship cannot sue for his wages after he has ceased to be master, or that the owner of cargo damaged cannot institute a suit for damage to cargo after he has sold the damaged goods? In the case of *The Idas* (1) a liberal construction was put upon the 8th section. If this were a suit in personam, the objection that the plaintiff has obtained security which the defendant cannot obtain would not apply. Yet it is clear that if in the present case the Court has jurisdiction, under the 8th section, to entertain a suit in personam, it has jurisdiction to entertain a suit in rem. If the Court has jurisdiction to entertain the suit, it has full power, if it thinks fit, to require the plaintiff to give security.

Cur. adv. vult.

Jan. 18. SIR ROBERT PHILLIMORE. This is a motion by the defendant to reject the plaintiff's petition. The petition states that the plaintiff was the sole owner of the *Lady of the Lake*, that he sold half the shares in the vessel to the defendant on the 18th of July, 1868. That the defendant sailed the vessel under his command on a voyage from Sunderland to the Brazils; that she returned with a homeward cargo on the 29th of August, 1869. The plaintiff prays that the 8th section of 24 Vict. c. 10, may be put in force on his behalf, and that this Court will decide the questions and settle the accounts outstanding between him and the defendant as co-owners.

But the plaintiff in his petition also states, that on the 31st of August, 1869, he sold all his shares—that is, the other half of the vessel—to one William Snowball; and it is upon this averment that the defendant contends that the whole petition ought to be rejected, inasmuch as the plaintiff has no persona standi under the statute, which it is contended only confers jurisdiction upon the Court in the case of persons who are co-owners at the time of the institution of the suit.

The 8th section is as follows:—"The High Court of Admiralty shall have jurisdiction to decide all questions arising between the co-owners, or any of them, touching the ownership, possession, employment, and earnings of any ship registered at any port in

(1) Brow. & Lush. 65.

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England or Wales, or any share thereof, and may settle all accounts outstanding and unsettled between the parties in relation thereto, and may direct the said ship or any share thereof to be sold, and may make such order in the premises as to it shall seem fit." It was argued on behalf of the defendant, that neither according to the letter nor according to the spirit of this enactment, had the Court jurisdiction in this case; not according to the letter, because the plaintiff had ceased to be a co-owner; not according to the spirit, because it was the duty of the Court to adjust the accounts between the co-owners; and that, if it shall turn out in this case that the plaintiff was indebted to the defendant, there were no shares of the plaintiff brought into court to answer a decree in favour of the defendant; and the practice of the Court of Chancery upon questions of this kind was referred to. To this it was replied, that the jurisdiction of the Court was not determined by the status of the plaintiff at the time when the suits were instituted, but by his status at the time when the cause of action accrued. Thus, under the 6th section, the owner or consignee of the cargo at the time when the damage was done to it might bring this suit, though he had subsequently parted with his interest in it; and the mariner might bring his claim for his wages as master, though he had ceased to discharge the duties of, or had been dismissed from, that office. In the other sections of the Act (4th, 5th, and 6th) the words "at the time of the institution of the cause" are inserted, which are wanting in the 8th section, and were inserted in these other sections for the protection of the defendant.

In the case of *The Idas* (1) my learned predecessor decided, that under this 8th section this Court might order an account to be taken between co-owners relating to matters which took place before the date assigned for the Act to come into operation, and also relating to a ship lost before the institution of the cause; and it would be difficult to maintain, according to the argument of the defendant in this case, that there were any co-owners after the ship was lost. I am of opinion that I am not prevented by the letter of the statute from taking cognizance of this cause; nor will my exercise of jurisdiction be at variance with the spirit of the enactment, for if the defendant in his answer should claim a

(1) Brow. & Lush. 65.

balance in his favour, I shall, in pursuance of the provision in the section, "make the order in the premises which I think fit," and which in this case will be that bail to the amount of the moiety of the ship be given by the plaintiff before the accounts are referred to the registrar for his investigation and report. As this is the first time in which this question has been raised before me, I shall make no order as to the costs of this motion.

Proctors for plaintiff: *Rothery & Co.*
Proctors for defendants: *Clarkson, Son, & Greenwell.*

THE ELIZABETH.

Jan. 18.

The County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *s.* 31 —*Appeal to the Court of Admiralty—Cross Causes of Damage Heard at the same Time and upon the same Evidence.*

Cross causes of damage, each instituted in the sum of 100*l.*, were heard in the City of London Court at the same time and upon the same evidence. A decree was pronounced in the first cause, dismissing the cause; by the decree in the second cause the defendants' ship was pronounced solely to blame. By agreement the amount of damage was referred to the assessors of the Court. The owners of the ship, pronounced solely to blame, entered two appeals in the Court of Admiralty, one against the decree in each cause:—

Held, on motion to dismiss the appeal in the second cause, that on proof that the damage decreed to be due in that cause did not exceed the sum of 50*l.*, the appeal must be dismissed.

On the 26th of July, 1869, a cause for damage was instituted in the City of London Court, under the provisions of the County Courts Admiralty Jurisdiction Act, 1868, on behalf of the owners of the brigantine *Elizabeth* against the owners of the screw steamer *Adalia*. About the same time a cross cause was instituted in the same court by the owners of the *Adalia* against the owners of the *Elizabeth*. Each cause was instituted in the sum of 100*l.* On the 3rd of December the causes were heard together upon the same evidence by the judge of the City of London Court assisted by assessors. (1) In the first cause, the cause instituted against the

(1) Order 37 of the General Orders for Regulating the Practice of the Admiralty Jurisdiction of the County Courts, provides, that where cross suits for damage are pending in the same court, "the Court may direct that both suits may be heard at the same time and upon the same evidence."

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owners of the *Adalia*, the Court pronounced a decree dismissing the cause with costs. In the other cause, the cause instituted against the owners of the *Elizabeth*, the Court decreed that the *Elizabeth* was solely to blame. It was agreed between the parties that the amount of damage should be assessed by the nautical assessors who assisted the judge at the hearing, but no steps had been taken to have the amount of damage fixed by them. Against the decree in each cause the owners of the *Elizabeth* entered an appeal in the Court of Admiralty.

R. E. Webster, on behalf of the owners of the *Adalia*, moved to dismiss the appeal against the decree in the cause in which the owners of the *Adalia* were plaintiffs, upon the ground that the damage sustained by the *Adalia* did not exceed 50*l*. He moved upon two affidavits, one made by the proctor for the owners of the *Adalia*, and one by the proctor's clerk; these affidavits stated that the damage sustained by the *Adalia* was less than 50*l*. According to the 31st section of the County Courts Admiralty Jurisdiction Act, 1868, there can be no appeal unless the amount decreed or ordered to be due exceeds 50*l*. At present no amount has been decreed or ordered to be due. Even if the decree pronounced be regarded as a judgment for such amount as the nautical assessors may find due, it is clear that they will not find a sum due exceeding 50*l*. There is no reason why the Court should not look at the statements in the affidavit for the purpose of ascertaining what the real claim is: *North* v. *Holroyd*. (1)

Edwyn Jones, on behalf of the owners of the *Elizabeth*, opposed the motion, and moved that the two suits be consolidated, and all further proceedings in the Court below stayed. It is clear that the owners of the *Elizabeth* have a right to appeal against the decree in the suit instituted by them against the owners of the *Adalia* (2); *The Doctor van Thunnen Tellow*. (3) As the two suits were heard together upon the same evidence, they are practically

(1) Law Rep. 3 Ex. 69.

(2) The appeal in the suit against the owners of the *Adalia* was proceeded with. The appeal was heard by the Judge of the Court of Admiralty, assisted by two of the Elder Brethren of the Trinity House, on the 9th of February. The Court reversed the decree of the Court below, and gave judgment for the appellants with costs.

(3) 17 W. R. 899.

one suit, and there is no good reason why each party should not have the same right of appeal. If the decree is to be reversed in one of the causes justice requires that it should be reversed in the other.

Webster, in reply. The practice of hearing cross causes of damage, at the same time and upon the same evidence, is common in the Court of Admiralty, but the two causes are, nevertheless, in a Court of Admiralty treated as distinct causes; separate decrees are pronounced, and in each cause the proceedings on appeal to the Privy Council are distinct. There is no reason why a different practice should be followed where cross causes are heard together in the county court.

Cur. adv. vult.

Jan. 18. SIR ROBERT PHILLIMORE. This is a cause of appeal from the City of London Court, instituted by the owners of the *Elizabeth* against the owners of the *Adalia* in the sum of 300*l.* There were cross suits in the Court below, which, under the 37th order of the General Orders issued under the County Courts Admiralty Jurisdiction Act, 1868, were heard "at the same time and upon the same evidence." By the 31st section of the County Courts Admiralty Jurisdiction Act, 1868, it is provided that "no appeal shall be allowed unless the amount decreed or ordered to be due exceeds the sum of 50*l.*" In the suit in which the *Elizabeth* was plaintiff, the cause was dismissed; and in the suit in which the *Elizabeth* was defendant, she was pronounced solely to blame; and the amount of the damage was referred by consent to the nautical assessors. The report of the assessors I have not before me; but I have two affidavits, one from the proctor for the *Adalia*, stating that he verily believes the damage sustained by the *Adalia* to be the sum of 29*l.* 10*s.* 1*d.*, and no more; and another affidavit from the managing clerk of the owners of the *Adalia* to the effect that the damage sustained by her does not exceed 50*l.* It appears from the affidavit of the solicitor for the *Elizabeth* that both the suits were instituted for the sum of 100*l.* in the Court below. The *Elizabeth* has appealed in both causes. The *Adalia* prays that the appeal in the case in which she was plaintiff in the Court below may be dismissed with costs, on account of the damage received by

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her being under the sum of 50*l.* The *Elizabeth*, on the other hand, prays that the two suits may be consolidated, and that an order may be made as to the amount of security for costs, and all further proceedings in the Court below stayed. Upon this state of facts two questions have been mooted before me. First, whether the two suits, having been heard together in the Court below, should not be considered as one suit; in which case, as the *Elizabeth* claims upwards of 50*l.* and has received nothing, the provisions of the section limiting the right of appeal, according to my ruling in the *Doctor van Thunnen Tellow* (1), would not apply. Secondly, whether I have proper evidence before me that, in the case in which the *Elizabeth* is defendant, the amount decreed, or ordered to be due, does not exceed 50*l.* As to the first question, I am of opinion that the two suits cannot be considered as one, any more than if they had been respectively instituted in different county courts. This position is further confirmed by the practice, on appeals from the High Court of Admiralty, in which cross suits, which have been heard together, are treated as separate with respect to the institution of the appeal. I must, therefore, dismiss this appeal when I have proper evidence before me that the amount decreed, or ordered to be due, does not exceed 50*l.* The second question is, whether I have or not the requisite evidence on this point; and I am of opinion that I have not. The finding of the assessors as to the amount will, I presume, be made part of the decree, and on an affidavit being filed that that finding places the amount under 50*l.*, I shall direct that the appeal in the suit in which the *Adalia* is plaintiff be dismissed. The motion will stand over for the filing of this affidavit.

Proctors for owners of the *Elizabeth*: *Lowless & Nelson*.
Proctors for owners of the *Adalia*: *Dyke & Stokes*.

(1) 17 W. R. 899.

PROCEEDS OF THE ALBERT CROSBY.

1870
Jan. 11.

Necessaries—Money Advanced to Discharge a Shipwright's Lien on a Vessel.

A., being master and sole owner of a vessel, put her into a shipwright's dock for repair. The shipwright repaired the vessel, and refused to allow her to leave his dock until his bill for the repairs was paid for. A. having no funds, the plaintiff lent him money to pay the shipwright's bill, and A. paid the bill with the money lent :—

Held, that the plaintiff was entitled to recover the amount of the loan in a suit for necessaries.

THIS was a suit for necessaries instituted against the proceeds arising from the sale of the *Albert Crosby*.

In the month of June, 1858, the barque *Albert Crosby*, of Nova Scotia, was in the Thames, and one Soule, who was her master and sole owner, requested Messrs. Brown, shipwrights at Rotherhithe, to execute certain necessary repairs to the barque. The barque was taken into Messrs. Brown's dry dock, and there repaired. Messrs. Brown refused to allow the barque to leave their dock until their bill for the repairs was paid. Soule had no funds wherewith to pay the bill, and he applied to the plaintiff to lend him money to pay it; the plaintiff accordingly lent Soule 215*l.*, which Soule paid to Messrs. Brown for the repairs done by them. The barque then sailed on a voyage to Melbourne. Soule promised the plaintiff to remit the amount borrowed out of the freight to be received at Melbourne, but he did not do so.

In 1860 Soule was in England, and the plaintiff recovered judgment against him in an action in the Court of Common Pleas for the said sum of 215*l.* and costs of suit; but the plaintiff never obtained any satisfaction of the judgment.

In 1859 the *Albert Crosby* was sold under an order of the Court of Admiralty, made in a suit then pending, and a balance of the proceeds of the sale of the vessel after payment of certain claims thereon remained in the registry. No owner or part owner of the *Albert Crosby* was domiciled in England or Wales at the time of the institution of the present suit.

The case came on for hearing on the above facts.

Butt, Q.C., asked the Court to order the sum of 215*l.*, and certain

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other moneys, to be paid out of the proceeds in the registry to the plaintiff. It is clear that the term "necessaries" may include money advanced for the purpose of procuring necessaries: *The Sophie* (1); *The N. R. Gosfabrick.* (2) It is true it has been said that money advanced to discharge a debt already incurred for necessaries does not fall within the definition of necessaries. That may be so where the money is advanced under ordinary circumstances, but in the present case the money was advanced for the purpose of releasing the ship from the possessory lien of the shipwright. The principle laid down in the case of *The Hebe* (3) is applicable to the present case.

SIR ROBERT PHILLIMORE. I am of opinion that in the particular circumstances of this case I may treat the money advanced as coming within the definition of necessaries, and I grant the order asked for.

Proctors for plaintiff: *Pritchard & Sons.*

Jan. 25.

THE WESTERN OCEAN.

Mortgage—Interest on the Money paid into Court by Defendant to Procure Release of Ship.

A ship was mortgaged to the defendant to secure a sum exceeding 1400*l.*; the mortgage was duly registered, and the defendant took possession of the ship and advertised her for sale. Before the sale the plaintiff, who held a mortgage on the ship, made and registered after the date of the registration of the mortgage to the defendant, instituted a suit against the ship to enforce his mortgage, and caused the ship to be arrested. The defendant, to obtain the release of the ship, paid 500*l.* into court in lieu of bail. The ship was sold by the defendant, and the proceeds were insufficient to satisfy the defendant's mortgage. The plaintiff, when the cause was ripe for hearing, abandoned the suit. The Court condemned the plaintiff in costs, and ordered him to pay to the defendant interest on the 500*l.* paid into court.

THIS was a cause of mortgage, instituted on the 26th of August, 1869, against the ship *Western Ocean.* The ship was arrested on the 28th of August. An appearance was entered on behalf of the

(1) 1 Wm. Rob. 368. (2) Swa. 344.
(3) 2 Wm. Rob. 146.

defendant on the 3rd of September. On the 16th of September the defendant tendered bail. The plaintiff objected to the sufficiency of the bail, and entered a caveat against the release of the ship. On the 22nd of September the defendant paid 500*l.* into court in lieu of bail, and on the 24th of September the ship was released. The plaintiff in his petition, alleged that on the 10th of June, 1869, one Mirabita, the sole owner of the ship, mortgaged her to the plaintiff to secure payment of a sum of 236*l.* 8*s.* 6*d.* The defendant, in his answer, which was dated the 11th of October, 1869, alleged that on the 4th of May, 1869, the said Mirabita, to secure moneys due or to become due to the defendant, on account current, mortgaged the ship to the defendant by a mortgage which was duly registered on the 6th of May, 1869, and that the defendant then became the first mortgagee of the ship; that the defendant, on the 23rd of August, 1869, as such mortgagee, took possession of the ship, and on the 24th of September, 1869, sold her for 1400*l.*, the best price that could be obtained; and that there was due from the said Mirabita to the defendant a sum of money secured by the said mortgage largely exceeding 1400*l.* After this answer was filed, the judge, on the 3rd of November, 1869, upon the application of the plaintiff, made an order that the defendant should allow the plaintiff to inspect the mortgage deed of the 4th of May, 1869. On the 20th of October the plaintiff filed his reply, in which he denied that there was due from Mirabita to the defendant a sum exceeding or amounting to 1400*l.*, and he denied that the sale of the ship on the 24th of September, 1869, was for the best price that could be obtained. The 25th of January, 1870, was fixed for the hearing of the cause. On the 11th of January the plaintiff's solicitors gave notice to the defendant's proctor that they would not proceed further in the cause, and on the 18th of January the 500*l.* which had been paid into court was ordered to be paid out to the defendant's proctor.

Jan. 25. *Gibson*, on behalf of the defendant, moved the Court to condemn the plaintiff in costs, and also in interest at 5*l.* per cent. per annum, upon the sum of 500*l.* paid into court in lieu of bail, from the 22nd of September, 1869, to the 18th of January, 1870. He read an affidavit, in which it was stated that prior to the insti-

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tution of the suit the defendant had advertised the ship for sale, and that a copy of the advertisement of sale had been sent to the plaintiff before the sale. The affidavit also stated that another person had a claim in respect of another mortgage on the ship for 150*l.* and interest, which was registered on the 7th of June, and before the plaintiff's mortgage.

Dr. Tristram, for the plaintiff, contended that the plaintiff as third mortgagee had a right to arrest the ship, and when the defendant appeared to contest the plaintiff's claim, the plaintiff had a right to inquire into the defendant's claim, and to have an opportunity of investigating the accounts. After investigation the plaintiff was satisfied that the defendant's claim was entitled to priority, and he adopted a proper course in abandoning the suit. The defendant acted improperly in taking measures to have the vessel sold while she was under the arrest of the Court.

Gibson, in reply. It was competent to the defendant to sell his interest in the ship even while she was under arrest. Such sale could not in any way interfere with the proceedings in this court.

SIR ROBERT PHILLIMORE. I cannot see that the plaintiff in this cause had any reasonable ground to dispute the defendant's claim. Considering all the circumstances of the case, I must condemn the plaintiff in costs, and I must order him to pay interest, at the rate of 4*l.* per cent. per annum, on 500*l.* from the 22nd of September to the 18th of January, 1870.

Solicitors for plaintiff: *Sydney & Son.*
Proctor for defendant: *Coote.*

THE PRINCESS ROYAL.

1870
Feb. 15.

Admiralty Court Act, 1861 (24 *Vict. c.* 10), *s.* 6—*Damage to Cargo—Breach of Duty or Breach of Contract on the part of Owner and Master—Civil Proceedings founded upon Acts alleged to be Felonious.*

In a cause in rem, instituted on behalf of the assignees of a bill of lading, the petition alleged that, whilst the vessel was on a voyage to a British port with the cargo mentioned in the bill of lading on board, the master and sole owner of the vessel wilfully cut down and destroyed parts of the vessel, and wilfully abandoned the vessel on the high seas; and the vessel and cargo were afterwards taken possession of as derelict by certain salvors, and towed by them into a British port, and the cargo never was delivered by the defendant to the plaintiffs in accordance with the terms of the bill of lading, although such non-delivery was not occasioned by any of the perils in the bill of lading excepted, and the plaintiffs were compelled to pay money to the salvors before they could get possession of the cargo, and the delivery of the cargo to the plaintiffs was delayed. It appeared from the proceedings in the cause that the vessel was a foreign vessel and the master was a foreign subject:—

Held, that the facts disclosed a breach of duty or breach of contract within the meaning of the 6th section of the Admiralty Court Act, 1861, in respect of which the plaintiffs were entitled to institute a cause in rem, and that it was competent to the plaintiffs to institute such cause, although no criminal proceedings had been taken against the defendant.

THIS was a cause instituted against the *Princess Royal* on behalf of the assignees of a bill of lading of cargo laden on board that vessel, to recover damages for breach of contract and breach of duty on the part of her master and sole owner. The following are the material allegations contained in the petition.

1. The *Princess Royal* is a vessel of which no owner or part owner was, at the time of the institution of such cause, domiciled in England or Wales.

2. The master of the *Princess Royal* is the defendant in this cause, and was and is the sole owner of the vessel.

3. On or about the third day of September, 1869, one Christian Hansen, of Hernosand, caused to be shipped a cargo of battens on board the said vessel, then lying in the port of Hernosand, and the defendant being the master and owner of the vessel as aforementioned, received and accepted the same to be carried on board the vessel from Hernosand to Elsinore for orders upon the terms of a certain bill of lading comprising the cargo of battens.

The fourth article set out the bill of lading.

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5. The bill of lading was afterwards endorsed by Christian Hansen to the plaintiffs, who became, were, and are, assignees of the bill of lading within the true intent and meaning of the Admiralty Court Act, 1861.

6. The vessel sailed with the cargo on board on her voyage to Elsinore for orders, and duly arrived there on or about the 26th of September, 1869, where she received orders to sail to West Hartlepool.

7. The vessel sailed with the cargo on board from Elsinore on her voyage to West Hartlepool on the 28th of September, 1869.

8. Whilst in the prosecution of the voyage from Elsinore to West Hartlepool, the defendant and the crew on board the vessel wilfully, improperly, and fraudulently cut down, destroyed, injured, and endangered parts of the vessel, her tackle, apparel, and furniture.

9. Having damaged and injured the ship as aforesaid, the defendant and his crew wilfully, improperly, and fraudulently abandoned the vessel and cargo on the high seas.

10. About 9 A.M. of the 4th of October, 1869, the vessel and cargo having been abandoned as aforesaid were found on the high seas and taken possession of as derelict by the master and crew of the vessel *John and Alice Brown*, of Whitby, and by them towed into the port of Middlesborough on the 9th of the same month.

11. By reason of the premises the plaintiffs were compelled to pay and did pay a large sum to the owners, master, and crew of the ship, *John and Alice Brown*, for and in respect of their salvage services, before they could get possession of the cargo of battens, the delivery whereof to the plaintiffs was also by reason of the premises aforementioned considerably delayed, whereby the plaintiffs sustained great loss and damage.

12. This cargo never was delivered by the defendant to the plaintiffs in accordance with the terms of the bill of lading, although such non-delivery was not occasioned by any of the perils in the bill of lading excepted.

13. The vessel has been sold by and under the authority of this Court, and the net proceeds of the sale thereof now remain in the registry thereof.

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Phillimore, for the defendant, moved to reject the petition. First, the Court has no jurisdiction; there is no actual damage to the goods. The words "breach of duty or breach of contract" in the 6th section of the Admiralty Court Act, 1861, must be read in connection with the rest of the section: *The Kasan.* (1) They relate only to damage to goods. *The Santa Anna* (2), *The Norway* (3), and *The Tigress* (4), are cases in which the Court exercised its jurisdiction to the fullest possible extent, and in those cases there was an absolute refusal by the master to deliver the goods. In the present case there was no such refusal; the detention complained of was occasioned by the salvors, who claimed by a paramount title. Secondly, this is matter of felony (24 & 25 Vict. c. 97, s. 43), matter of felony cannot form the subject of a civil suit till after trial of the felon: *Cox* v. *Paxton* (5); *Stone* v. *Marsh.* (6) Thirdly, in any case the res is not liable for the consequences of acts out of the ordinary scope of a master's duty: *The Ida.* (7) It cannot make any difference that in this case the master was also the owner, as the suit here is against the res. The owner being master may be personally liable, but the right to proceed against the res is a peculiar privilege unknown to common law, and available only to enforce recognized maritime rights arising out of obligations ordinarily incident to the authority of those in command of ships. When in causes of collision the owner of the wrong-doing ship is also owner of the cargo, the cargo cannot be arrested: *The Victor.* (8) The objection is a substantial one; to decide otherwise would be to prejudice innocent lienees entitled to priority, by depriving them of the security of the res. Shipowners may be liable personally when the res is not liable: *The Waldo.* (9)

E. C. Clarkson, for the plaintiffs. First, it is clear that there has been a breach of duty or breach of contract on the part of the defendant in connection with damage done to goods. This is sufficient to bring the case within the jurisdiction of the Court:

(1) Br. & L. 1; 32 L. J. (P. M. & A.) 97.
(2) 32 L. J. (P. M. & A.) 198.
(3) Br. & L. 226.
(4) Br. & L. 38; 32 L. J. (P. M. & A.) 79.
(5) 17 Ves. 329.
(6) 6 B. & C. 551.
(7) Lush. 6.
(8) Lush. 72.
(9) Davies's Amer. Rep. 161.

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The Dantzig (1); *The Bahia* (2); *The Felix* (3); *The Wilhelm.* (4) Secondly, the master was sole owner, and it matters not whether he was acting within the ordinary scope of a master's duty. The question of agency does not arise, and the cases cited do not apply to the present facts. Thirdly, the facts alleged in the petition do not amount to felony. If the word "fraudulently" were not in the petition, there would be no pretence for saying that the facts amounted to felony, and the word fraudulently is quite immaterial. Even if the facts do amount to felony, that circumstance does not afford any answer to proceedings such as the present. At all events the defendant is not amenable to English criminal law. It appears from affidavits filed in the cause that the ship is a Swedish ship; the defendant is a foreign subject, and he cannot be prosecuted criminally in this country for acts done by him on board the ship while she was on the high seas: *Reg.* v. *Anderson.* (5)

Phillimore, in reply.

Cur. adv. vult.

Feb. 25. SIR ROBERT PHILLIMORE. In this case I have to consider certain objections which are taken to portions of a petition in a cause instituted under the 6th section of the Admiralty Court Act, 1861. The petition states, in substance that on the 3rd of September, 1869, Christian Hansen shipped a cargo of battens on board a vessel which it appears was Swedish, lying in the port of Hernosand; they were to be carried, according to the terms specified in the bill of lading, to Elsinore for orders. The vessel arrived at Elsinore on the 26th of September, where she received orders to sail to West Hartlepool, to which place she sailed on the 28th of September. The vessel has been sold under the authority of this Court, and the proceeds of the sale are now in the registry.

What befel the vessel on her voyage to West Hartlepool is stated in the following articles of the petition, which are objected to

(1) Br. & L. 102; 32 L. J. (P. M. & A.) 164.

(2) Br. & L. 61.

(3) Law Rep. 2 A. & E. 273.

(4) Report of the Registrar and Merchants, 25th July, 1865.

(5) Law Rep. 1 C. C. R. 161.

upon the grounds presently to be mentioned. [The learned Judge then read the 8th, 9th, 10th, and 11th articles of the petition.]

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The first objection taken to the admissibility of these articles is that the Court has no jurisdiction under the statute, inasmuch as there is no allegation that there has been actual damage to cargo, nor that the cargo has been lost, nor that the master has refused to deliver the cargo; and moreover, that in this case the alleged detention of the cargo was a detention by third parties claiming by title of possession in a derelict, and not a detention by the master or his agent; and in support of this objection the cases of *The Tigress* (1), and *The Norway* (2), were cited to shew the utmost extent to which the Court had gone, and *The Santa Anna* (3), as marking the limit which the Court had set to its jurisdiction in cases of "breach of duty or contract" under the statute.

But to these cases others were added by the plaintiff's counsel, which it may be convenient to mention now: *The Dantzig* (4), in which the Court exercised jurisdiction over a claim for short delivery of cargo, to be delivered according to bill of lading in a British port, though the goods not delivered were not, in fact, carried into port. *The Bahia* (5), in which the plaintiffs were the owners of certain corn which was laden on board the *Bahia* at New York, under a bill of lading to be delivered at Dunkirk, in France: on the voyage the master put into Ramsgate, and landed the cargo, and refused either to carry on to Dunkirk or to give delivery at Ramsgate. The *Wilhelm*, in which the plaintiff complained that the master delayed the prosecution of his voyage, and that, owing to his negligence, the cargo did not reach the port of destination until an unduly late period, and in which the Court pronounced for the damage, and made the usual order of reference to the registrar and merchants (the 25th of July, 1865); this case has not been reported. *The Felix* (6), decided by myself, in which the plaintiffs obtained damages because the master did not obey the order of the consignee to discharge his cargo in a particular dock.

(1) Br. & L. 38; 32 L. J. (P. M. & A.) 79.
(2) Br. & L. 226.
(3) 32 L. J. (P. M. & A.) 198.
(4) Br. & L. 102; 32 L. J. (P. M. & A.) 164.
(5) Br. & L. 61.
(6) Law Rep. 2 A. & E. 273.

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A second objection to these articles is that the matters pleaded in them amount to a charge of felony, and that a Court of civil judicature must refuse to entertain such a cause until a criminal court has adjudicated thereupon. It was contended that a felony cannot be the foundation of a civil action, and for this position reliance was placed upon *Cox* v. *Paxton* (1); *Stone* v. *Marsh* (2); *Ex parte Elliott* (3); and the statute 24 & 25 Vict. c. 97, s. 43, re-enacting s. 6 of 7 Wm. 4 and 1 Vict. c. 89 (repealed by 24 & 25 Vict. c. 95), was cited to shew that the charges contained in the articles were barratrous and felonious.

The third and last objection was that this being a proceeding in rem and not in personam, the ship or res was not liable for acts of the master done without the scope of his duty, *The Waldo* (4); and that this position was not affected by the fact that the master was (as pleaded in the second article) the sole owner. It was urged that this Court had refused to allow a cargo to be arrested in a case in which the same person was owner of the ship and of the cargo, *The Victor* (5); and that innocent liens on the ship not at present appearing might be injured by these proceedings against the ship.

These various points in the case have been well argued on both sides, but, inasmuch as I am about to say why I think the articles are substantially admissible in their present form, it is not necessary to state the arguments in reply, to which I in great measure accede, as fully as, in a case somewhat novel, I have thought it right to state the objections. The real ground of action in this suit is stated in the 12th article of the petition, which is as follows:—"The said cargo was never delivered by the defendants to the plaintiffs in accordance with the terms of the said bill of lading, although such non-delivery was not occasioned by any of the perils in the said bill of lading."

Assuming, as I am bound to do at present, the facts to be correctly stated in the other articles, there is no doubt that the averment contained in this article is true. The owners have gotten their goods at a port other than that specified in the contract, and

(1) 17 Ves. 329.
(2) 6 B. & C. 551.
(3) 2 Deacon's Bank Rep. 179.
(4) Davis's Amer. Rep. 164.
(5) Lush. 72.

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not from the master, but from third parties, namely the salvors. Here there is a breach of contract relating to the goods whereby the owners have been damnified. I am of opinion that it is not necessary that the damage should be actual in order to found the jurisdiction of the Court. It may be of that constructive character resulting from wrong or improper delivery or detention, or the like causes; and in this opinion I am fortified as well by the precedents to which I have referred as by the natural construction of the language of the statute. It appears from the articles objected to, that although the detention of the cargo was not immediately the act of the master, inasmuch as the cargo had passed out of his hands into those of third parties, who had a lien upon it, yet that the detention was the consequence of previous misconduct on the part of the master. The articles which plead these facts are admissible according to the rules of this Court, as shewing the history of the transaction, and the continuing liability of the master.

I will now deal with the objection that the action ought to have been in personam and not in rem, that the master acted beyond the scope of his duty, and that in condemning the res I may be injuring innocent liens which do not appear. I am of opinion that the petitioner had a right under the statute to institute this suit in rem, and that the owner of the ship is responsible to the shipper for the loss or damage alleged in this case. I do not think that the objection that the act of the master did not bind the owner can avail. The case of *The Waldo* (1), which is well deserving of study, does not support this proposition. The master in that case had been made by the shipper the consignee of the cargo. The case of *The Ida* (2) was of a most peculiar character; secondly, the judgment in it was mainly founded on a want of jurisdiction in the Court. As to the possible existence of secret liens on this ship, the answer is, that if there be such, the possessors of them are now apprised by the forms of this Court that they may come in and defend their interests, and obtain for their claims their due priority.

With respect to the objection that the articles contain a charge of felony in which the right of action for the civil wrong is merged, I felt at first some difficulty upon this point, and I am certainly not inclined unnecessarily to entangle myself in this question of

(1) Davis's Amer. Rep. 164. (2) Lush. 6.

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merger, which is perhaps not in principle always very satisfactorily explained, or in practice always very consistently applied, by the authorities at common law. It is true, that although the master be sole owner, the acts alleged would probably render a British subject guilty of felony under the statute 24 & 25 Vict. c. 97, and it has been suggested, although the vessel be a foreign vessel, and the master a foreigner, yet, as the offence was committed "super altum mare," this Court of maritime international law ought to hold itself less fettered as to criminal jurisdiction in this matter than a common law court, which would not, under these circumstances, be competent to take cognizance of the offence: *Reg.* v. *Serva* (1); *Reg.* v. *Anderson.* (2)

I must not be understood as assenting to this argument, but I shall direct the word "fraudulently" to be struck out of the 9th and 10th articles. It is not necessary for the case of the petitioner in this Court. It introduces an issue which might unnecessarily complicate and increase the costs of the suit. With this alteration, I admit the petition.

Proctors for plaintiffs: *Dykes & Stokes.*
Solicitor for defendant: *Barker.*

March 9.

THE ENERGY.

Jurisdiction—Contract of Towage—Duty of Pilot in charge of Ship in Tow to direct the Navigation of the Tug.

The Court of Admiralty has jurisdiction to entertain a suit instituted by the owners of a vessel against a steam-tug engaged to tow the vessel for negligently towing the vessel so as to cause her to come into collision with and do damage to another vessel.

Where a steam-tug is engaged to tow a vessel which is in charge of a pilot, the tug is bound to obey the orders of the pilot, and the pilot is bound to give the tug proper directions and to superintend her navigation.

A barque, in charge of a pilot who was on board her, was being towed by a steam-tug in waters where the employment of a pilot was compulsory. The tug ported her helm, and passed across the bows of a brig under way, there was no room for the barque to follow in her wake, and the barque came into collision

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(1) 1 Den. C. C. 104. (2) Law Rep. 1 C. C. R. 161.

with the brig. The pilot gave no orders to the tug before or after she ported; if he had given proper orders, even after the tug had ported, the collision might have been avoided:—

Held, that the tug was to blame for attempting to tow the barque across the bows of the brig; but that the owners of the barque could not, on account of the neglect of the pilot to give proper orders, recover against the tug damages in respect of the collision.

THIS was a suit brought on behalf of the owner of the barque *Lizzie Aisbitt* against the steam-tug *Energy* to recover damages arising out of a collision between the *Lizzie Aisbitt* and a brig called the *Mary*. On the 1st of April, 1867, the *Lizzie Aisbitt* homeward bound arrived off Southend, where her master engaged the steam-tug *Energy* to tow her up the Thames for reward in that behalf. The *Energy* took the *Lizzie Aisbitt* in tow, and towed her to Gravesend, where a licensed pilot came on board the *Lizzie Aisbitt*, and took charge of her, and remained in charge of her until after the collision. The *Energy* then proceeded to tow the *Lizzie Aisbitt* up the river to St. Clement's Reach. As the vessels were proceeding up St. Clement's Reach, about 150 feet of tow rope being out, the wind being about S.W., and the tide flood, and of the force of from two to three knots an hour, they came in sight of the *Mary*. The *Mary* was under sail and beating up the river, and standing over on the port tack heading to the northward and westward. No orders having been given by the pilot, the *Energy* ported her helm, and attempted to tow the *Lizzie Aisbitt* ahead of the *Mary*. When the *Energy* ported her helm, the pilot of the *Lizzie Aisbitt*, thinking there was not room for the *Lizzie Aisbitt* to pass ahead of the *Mary*, ordered the helm of the *Lizzie Aisbitt* to be starboarded, and cast off the tow rope from the bitts of the *Lizzie Aisbitt*, but gave no orders to the *Energy*. The *Energy* passed just ahead of the *Mary*, but the stern of the *Lizzie Aisbitt* struck the *Mary* about amidships on the starboard side, and the *Mary* in consequence afterwards filled with water, and she and her cargo were considerably damaged. (1)

(1) The petition alleged "that great loss and expense was thereby occasioned to the plaintiff," and prayed the Court to refer the accounts and vouchers relating to the damage to the registrar, assisted by merchants. There was no allegation in the petition that the *Lizzie Aisbitt* had sustained damage. In a suit instituted by the owners of the *Mary* against the *Lizzie Aisbitt* in 1867 the *Lizzie Aisbitt* was pronounced alone to blame for the collision.

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March 2. *The Admiralty Advocate* (*Dr. Deane, Q.C.*), and *E. C. Clarkson*, for the plaintiff.

Butt, Q.C., and *Murphy*, for the defendants. Before the Court entered upon the hearing, *Butt, Q.C.*, stated that he contended the Court had no jurisdiction to try the case. The action was founded upon an alleged breach of a contract to tow with reasonable care, and the Court had no jurisdiction to entertain actions of this nature founded upon breach of contract. He took the objection, in order that he might be in a position to move for a prohibition if necessary.

THE COURT decided to proceed with the hearing of the case, and proceeded accordingly. After the hearing of the case,

The Admiralty Advocate contended that the evidence before the Court shewed clearly that there was not room for the *Lizzie Aisbitt* to pass ahead of the *Mary*, and that the collision was occasioned by the *Energy* improperly porting her helm.

Butt, Q.C. The porting of the helm of the *Energy* was not, under the circumstances, an improper manœuvre. But even if it was, the defendants are not liable, because the tug was under the orders of the pilot of the *Lizzie Aisbitt;* and if the helm of the *Energy* was improperly ported, he is the person to blame. This is an action for not towing with reasonable care. It is founded on contract. It is one of the ordinary terms of the contract of towage that the tug shall use due care. But in cases where the ship towed is in charge of a pilot, it is part of the contract that the pilot shall give proper directions for the management of the tug: Maclachlan on Shipping, pp. 263, 264; and if in the present case the master of the *Lizzie Aisbitt* engaged the *Energy* on the terms that he should act under the orders of the pilot, the *Lizzie Aisbitt* cannot recover against the *Energy* for the consequences of the pilot's neglect.

E. C. Clarkson, in reply. First, there is no negligence on the part of the pilot. Secondly, there was no contract on the part of the *Lizzie Aisbitt* that the pilot should direct the tug. The ordinary terms of a contract of towage are the same, whether there is a pilot on board the ship towed or not. The pilot was not the servant

of the owners of the *Lizzie Aisbitt*, and they cannot be prejudiced by any neglect on his part. 1870

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Cur. adv. vult.

March 9. SIR ROBERT PHILLIMORE. So long ago as the 23rd of November, 1867, this Court decided that a vessel called the *Lizzie Aisbitt*, in tow of a tug called the *Energy*, was alone to blame for a collision with a vessel called the *Mary*. The case was argued before me by the present Mr. Baron Cleasby and Mr. Justice Brett; and I was assisted by Trinity Masters. The collision took place in St. Clement's Reach, in the river Thames, between 9 and 10 A.M. of the 1st of April, 1867. In that suit the pilot on board the *Lizzie Aisbitt* and the master of the tug *Energy* were both examined on behalf of the *Lizzie Aisbitt*, but the evidence of the pilot was that the collision was caused by the misconduct of the tug, for which, of course, so far as concerned the *Mary*, the *Lizzie Aisbitt* was responsible.

After a lapse of more than two years, no cause being assigned for the delay, the *Lizzie Aisbitt* brings her action against the *Energy*, praying that she may be condemned in all the damages and losses occasioned to the plaintiff by reason of the said collision, or the negligence and want of skill of those on board the steam-tug *Energy*.

Two questions of law have been suggested in argument in this case—First, whether the Court has jurisdiction in this matter. Second, whether the *Energy* has broken her contract with the *Lizzie Aisbitt*, and thereby become responsible to her for the damages incurred by the collision. The question as to jurisdiction does not come before the Court for the first time. The jurisdiction of the Court was recognized to a certain extent in the case of *The Julia* (1), to which I will presently more fully refer. In *The Night-watch* (2), a case precisely similar in its circumstances to the present, the jurisdiction of the Court was directly affirmed; while in *The Robert Pow* (3), the limits within which the jurisdiction must be exercised, were laid down. I pronounce, therefore, in favour of the jurisdiction of the Court.

(1) Lush. 224. (2) Lush. 542.
(3) Br. & L. 99; 32 L. J. (P. M. & A.) 164.

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I have next to consider whether the *Energy* has, by reason of a breach of contract with the *Lizzie Aisbitt*, become liable for the damage occasioned by the collision of that vessel with the *Mary*. In the year 1841, Dr. Lushington decided, in *The Duke of Sussex* (1), that a steam-tug employed in towing a vessel in the river Medway was not responsible for damage occasioned by the vessel in tow coming in contact with another vessel, the vessel in tow having a licensed pilot on board at the time, and no error or negligence being established on the part of the crew of the steam-tug. In the course of his judgment, he observed: "Does the circumstance of a vessel being in tow at the time in any degree alter the liability of parties? I apprehend not. What would be the consequence of taking the responsibility from the pilot on board a vessel in tow and casting it upon the steamer? Its immediate effect would be a conflict of authorities which would lead to inextricable confusion, and be highly prejudicial to the owners of vessels. Under the existing law, if a licensed pilot is on board and his orders are obeyed, the owners are absolved from responsibility for damage occasioned by such vessel; but if the pilot was to be deprived of his authority, and the steamer was not bound to follow his directions and a collision ensued, the steamer would be the agent of the owners of the vessel in tow, and the owners of that vessel would no longer be protected by the Act of Parliament." (2)

In 1848, the same learned judge decided, in the case of *The Christiana* (3), that steam-tugs employed in an ordinary service of towing merchant vessels are bound to be subservient to the orders of the pilot on board the vessel in tow. In delivering his judgment, Dr. Lushington said (4): "The action in this case is brought by the owners of the steam-tug, alleging that, in pursuance of a contract with the owners of the vessel proceeded against, they duly fulfilled that contract in towing her from Gravesend to the Surrey Canal Dock. This averment is denied by the owners of the *Christiana;* and it is alleged in their behalf that a collision with a brig called the *Mary Clarke* was occasioned by the misconduct of the persons on board the steam-tug, and that the owners of the barque having

(1) 1 W. Rob. 270.
(2) 1 W. Rob. at p. 273.
(3) 3 W. Rob. 27.
(4) 3 W. Rob. at p. 29.

incurred heavy expenses in repairing the brig as well as their own vessel were entitled to keep back the 8*l.* claimed by the steam tug by way of a set-off. The true question, I conceive, which I have to determine is, not whether there is anything in this case in the nature of a set-off, but whether the owners of the steam-tug have fulfilled the contract which they allege themselves to have entered into with the owners of the vessel proceeded against. In a former decision I have had occasion to observe that in all ordinary cases of this kind I consider it to be a part of the contract itself, that the steam-tug should be subservient to the pilot on board the vessel in tow, and that it is the duty of the persons on board the steam tug implicitly to obey and carry out his orders. I am speaking now of a steam tug in the performance of an ordinary towage service. There may, indeed, be cases in which this duty ought to be relaxed, and where the rule could not possibly be applied; as, for example, in cases of salvage, where the master of the steam-tug is called in to remedy the errors or misfortunes of the pilot, or where he sees a pilot acting in such a manner as to threaten the certain destruction of his own vessel, and to endanger the lives and property of others. In such cases the master of the steam-tug would unquestionably be justified in exercising his own discretion, and in acting upon his own knowledge independently of the pilot. But these cases, it is to be observed, form the exceptions to a general rule, and where such exceptions are alleged they must be proved by the fullest and most satisfactory evidence. In delivering my judgment in the case of the *Duke of Sussex* (1), I expressed my strong opinion upon the necessity of adhering rigidly to this rule, and I see no reason to depart from that opinion in the present instance." (1)

In 1861, the Privy Council, in the case of *The Julia* (2), dealt with this question of contract as follows: "The tug was hired off Folkestone, and the contract was that she should take the *Julia* in tow when required, and tow her as far as Gravesend. Their lordships think it quite immaterial whether the hiring took place on the importunity of the crew of the tug, or on the spontaneous suggestion of the *Julia*. When the contract was made, the law would imply an engagement that each vessel should perform its

(1) 1 W. Rob. 270. (2) Lush. 224, 231.

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duty in completing it; that proper skill and diligence would be used on board of each; and that neither vessel by neglect or misconduct would create unnecessary risk to the other, or increase any risk which might be incidental to the service undertaken. If, in the course of the performance of this contract, any inevitable accident happened to the one without any default on the part of the other, no cause of action could arise. Such an accident would be one of the necessary risks of the engagement to which each party was subject, and could create no liability on the part of the other. If, on the other hand, the wrongful act of either occasioned any damage to the other, such wrongful act would create a responsibility on the party committing it, if the sufferer had not by any misconduct or unskilfulness on her part contributed to the accident. These are the plain rules of law by which their lordships think that the case is to be governed."

The conditions of the contract, therefore, between the tug and the vessel towed under the charge of a pilot, are, so far as they affect this case, that on the one hand the tug shall be competent to tow the ship, and shall obey the orders of the pilot, and that on the other hand the pilot shall give proper directions to the tug, and superintend her navigation as well as that of the ship on which he is aboard. The defence of the tug *Energy* in the present action is twofold; first, that she acted rightly in porting and crossing the bows of the *Mary*, and that the *Lizzie Aisbitt* acted wrongly in starboarding and trying to pass under the stern of the *Mary*. Secondly, that the pilot did not give the proper directions to the *Energy*.

The facts of the case, so far as it is necessary to state them, were as follows. The *Lizzie Aisbitt*, a barque homeward bound from the Mediterranean, engaged the tug *Energy* at Southend, in the Thames, to take her in tow; at Gravesend she took on board a licensed river pilot. The pilot ordered the tug to turn the ship round when she was clear of the Custom House; he gave no other order before the collision took place. The tide was half flood. The vessels left Gravesend just below Terrace Pier, a few minutes after eight in the morning of the 1st of April, and arrived at Clement's Reach, the place of collision, a few minutes before ten. They went through the water at three and a half knots, and

more than half a knot more over the ground. The *Lizzie Aisbitt* drew fourteen feet of water. The captain says that the river was thronged with vessels, and that the tug ought not to have gone as she did up mid-channel, but on one or the other side of the river. The Trinity Masters do not think the tug was wrong in the course which she took; if she was wrong, the pilot was to blame for not giving her orders to alter her course.

There was 150 feet of tow-rope out. The *Lizzie Aisbitt* had passed two vessels lying in the stream of each other, one by starboarding, the other by porting, just before the collision. The *Mary* was particularly noticed by the pilot at a distance of 250 feet. The tug and the *Lizzie Aisbitt* were then straight up the reach. The *Mary* was standing across the river on the port tack. The tug ported, and cleared the *Mary;* the *Lizzie Aisbitt* starboarded, under the direction of the pilot, and ran into her amidships on the starboard side. The pilot had previously run to let go the rope, which was wound round the starboard bitts; he found no one, he says, to help him in doing this.

The Trinity Masters advise me that when the *Mary* was seen it must have been apparent that she was not backing and filling, but was under full sail standing to the north on the port tack, and of course with headway upon her. It was an error in judgment on the part of the tug to attempt to tow the *Lizzie Aisbitt* across the bows of the *Mary;* the *Lizzie Aisbitt* would probably have come into collision if she had followed the tug, although the tug herself just succeeded in clearing the *Mary*.

The first defence, therefore, set up on behalf of the tug in this cause fails.

I have now to consider the second defence, namely, that the pilot did not give proper directions to the tug. It was the duty of the pilot when the tug ported, to hail her to let go the tow-rope. The tow-rope on board the tug is attached by a simple slip—an eye over a hook so fastened that it can be let go immediately. The pilot according to his own evidence gave no order at all to the tug, but ran himself to cast the rope off from the starboard bitts round which it was belayed; in doing which he was, as I have said, unassisted. The tug, if the proper order had been given to her, could have cast off the rope in a much shorter

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time. And, if that order had been given, in all probability the barque would have gone under the stern of the *Mary*, and the collision would not have taken place. If the tug had disobeyed the order of the pilot she would have been guilty of a breach of contract and have been responsible for the collision. As it was, the tug committed an error, which was not corrected as it ought to have been by an order from the pilot; I must therefore dismiss the suit against the tug: but, having regard to all the circumstances, I shall make no order as to costs.

Solicitors for plaintiff: *Stocken & Jupp.*
Solicitor for defendant: *Cooper.*

March 18.

THE LITTLE LIZZIE.

Evidence—Examination taken by Receiver of Wreck—The Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *ss.* 448, 449.

Post 317

The examination of the crew of a salved vessel taken by the receiver of wreck under the 448th section of the Merchant Shipping Act, 1854, is not admissible as evidence in a salvage suit for the purpose of proving the facts stated in the examination.

THIS was a cause instituted to recover salvage reward for salvage services rendered to the brigantine *Little Lizzie*, near Penzance.

The Admiralty Advocate (*Dr. Deane, Q.C.*), and *Lodge*, for the plaintiffs.

Milward, Q.C., and *E. C. Clarkson*, for the defendants.

Two of the crew of the *Little Lizzie* had been examined upon oath before the receiver of wreck in the district where the salvage services were rendered, under the provisions of the 448th section of the Merchant Shipping Act, 1854. At the hearing of the cause, the receiver of wreck was called as a witness on behalf of the plaintiffs, and he produced the original examination taken down in writing. The counsel for the plaintiffs tendered the written examination in evidence; they contended that it was admissible

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by virtue of the provisions of the 449th section of the Merchant Shipping Act, 1854. (1)

The counsel for the defendants contended that the written examination was not admissible. They cited *Nothard* v. *Pepper* (2) and *McAllum* v. *Reid.* (3)

SIR ROBERT PHILLIMORE. The words of the statute are so general, that I feel great difficulty in putting a restricted meaning upon them. But I think it cannot have been intended by the legislature that the plaintiffs in a salvage suit should have an opportunity of making use of statements made by witnesses whom the defendants have not had the opportunity of cross-examining. I am supported in this view by the case of *Nothard* v. *Pepper.* (2) I must rule that the evidence is inadmissible in an inquiry such as the present.

Solicitors for plaintiffs: *Waltons, Bubb, & Waltons.*
Proctors for defendants: *Toller & Sons.*

(1) Section 449 of 17 & 18 Vict. c. 104, enacts that "any examination so taken in writing as aforesaid, or a copy thereof, purporting to be certified under the hand of the receiver or justice before whom such examination was taken, shall be admitted in evidence in any court of justice or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence as primâ facie proof of all matters contained in such written examination."

(2) 17 C. B. (N. S.) 39.

(3) This was a case tried at the last spring assizes, at Newcastle-upon-Tyne, before Willes, J. The plaintiffs were the owners of cargo shipped on board the defendant's ship, and they alleged that the master of the ship so negligently navigated her, that by reason of his negligence the ship went aground and the cargo was lost. The conduct of the master had, before the trial, been the subject of a Board of Trade inquiry, and his certificate had been suspended upon the ground that he had been guilty of negligence on the occasion in question. This appeared by an entry in the record of certificates kept in pursuance of s. 138 of the Merchant Shipping Act, 1854. That section provides that a certified copy "of any entry made as aforesaid in respect of any certificate shall be primâ facie evidence of the truth of the matters stated in such entry." The plaintiffs tendered a certified copy of the entry in the record of certificates as primâ facie evidence of the facts stated therein; Mr. Justice Willes rejected the evidence.

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Feb. 3.

THE OFFICE OF THE JUDGE PROMOTED BY BISHOP SUMNER *v.* WIX.

The Use of Lighted Candles—The Use of Incense.

To cause lighted candles to be held one on each side of the priest when reading the gospel, such lighted candles not being required for the purpose of giving light, is unlawful.

The ceremonial lighting and burning of candles, placed on a ledge or shelf over the holy table, and of candles placed on each side of the holy table is, during the communion service, unlawful.

The ceremonial use of incense immediately before the celebration of the holy communion, so as to be preparatory or subsidiary to the celebration of the holy communion, is unlawful.

Post 100
40 L.C. 283
284, 396
397
Pr. D. 133.
QBD. 706
7 App Cas 242

THIS case came before the Court by letters of request signed by Bishop Sumner when he was Bishop of Winchester. The articles charged the defendant, who is the vicar of the church of St. Michael and All Angels, Swanmore, with the ecclesiastical offences of adding to the ceremonies and rites prescribed by law to be used in church, by the burning of lights and the use of incense. The material allegations contained in the articles, and the substance of the evidence offered in support of them, appear fully in the judgment.

The defendant, on the 18th of November, 1869, moved that the suit be dismissed (1) upon the ground that Bishop Sumner, who was the promoter of the suit, had resigned the bishopric of Winchester. The application was refused, and the defendant afterwards brought in a responsive plea. The responsive plea contained, together with other articles, two articles, which were in substance as follows:—

1. The said R. H. E. Wix, the party articled against in this cause, is a clerk in holy orders of the United Church of England and Ireland; he was ordained by the Lord Bishop of Exeter deacon in January, 1855, and priest in May, 1856; from the time of his ordination until now he has been actively and constantly engaged in regular parochial duties; in August, 1866, he was nominated and appointed perpetual curate of St. Michael and All Angels, Swanmore, Isle of Wight, in the diocese of Winchester; and he

(1) Ante, p. 19.

still holds the said perpetual curacy or vicarage of St. Michael and All Angels.

2. That to supply the spiritual wants of the inhabitants of the ecclesiastical district belonging to the said vicarage, the said R. H. E. Wix, although there is no endowment whatever provided for the said vicarage, except a house for the use of the vicar, has provided for the said inhabitants on week days three daily services, viz., morning and evening prayer, and one celebration of the holy communion. That on Sundays he has provided two celebrations of the holy communion and three separate services, together with two sermons. That on all festivals of the church he has provided two celebrations of the holy communion and two separate services, viz., morning and evening prayer, together with a sermon. That at present the defendant himself conducts the whole of the services and celebrations aforesaid alone, and without regular assistance. That since the defendant has been appointed to the said vicarage, and since he has provided in the manner aforesaid for the said inhabitants, the congregation at the church of St. Michael and All Angels has largely increased, and the said church is at times overcrowded, and the defendant has reason to believe and believes that the said services and celebrations are entirely appreciated and approved by the members of the said congregation. And in part proof of the matters hereinbefore pleaded, and for all other lawful purposes, the party proponent prays the document marked I., hereto annexed, being a copy of an address to the Lord Bishop of Winchester, signed by upwards of 480 persons, members of the said congregation, may be taken and read.

On the 11th of December, 1869, *Dr. Deane, Q.C.* (*Dr. Tristram* with him), moved to reject the articles above set out. He contended that, as no question of character was involved in the suit, the matters alleged were immaterial.

A. Charles, contrà. The exhibit referred to in the 2nd Article is, no doubt, inadmissible; but the other matters alleged in the articles are matters which may properly be brought before the notice of the Court. In *Martin* v. *Mackonochie* (1) similar articles were pleaded by the defendant.

(1) Law Rep. 2 P. C. 365.

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SUMNER v. WIX.

SIR ROBERT PHILLIMORE. It is admitted that the latter part of the 2nd Article which refers to the exhibit must be struck out, and that the exhibit must be rejected. With that exception, I think the articles are admissible. It has always been the practice in this Court, in suits of this nature, to permit an accused clerk to bring to the notice of the Court facts relating to his conduct as a clergyman.

On the 10th of January, 1870, the case came on for hearing. *Dr. Deane, Q.C.*, and *Dr. Tristram*, appeared for the promoter. They contended that the case was governed by *Westerton* v. *Liddell* (1) and *Martin* v. *Mackonochie.* (2)

A. Charles appeared for the defendant. He contended that *Martin* v. *Mackonochie* did not govern this case. First, as to the lighted candles. It was not decided in *Martin* v. *Mackonochie* that the use of lighted candles was unlawful as a ceremony. All that was decided was that lighted candles upon the holy table were unlawful as ornaments. But the question here is, whether these candles are ornaments in the technical sense of the word. In deciding this question, the fact that the candles were not on the holy table is all important. In *Westerton* v. *Liddell*, a cross on the holy table was held to be an unlawful ornament, but crosses not upon the holy table were held to be lawful decorations. *Martin* v. *Mackonochie*, read in connection with *Westerton* v. *Liddell*, simply decides that lighted candles are unlawful as ornaments *if on the holy table.*

But even if the burning of candles upon the holy table is unlawful as a ceremony, it does not follow that the burning of candles elsewhere in the church is unlawful. The placing of the candles on the holy table is an important part of the ceremony, and "where part of a ceremony is changed the integrity of the ceremony is broken": *Martin* v. *Mackonochie.* (3)

In *Martin* v. *Mackonochie* the Judicial Committee addressed themselves to the consideration of ceremonies and ornaments in the technical sense of those words, but the consideration of ceremonies and ornaments does not exhaust the question: there is a tertium quid. Decorations are neither ornaments nor ceremonies;

(1) Moore's Special Report. (2) Law Rep. 2 A. & E. 116: Law Rep. 2 P. C. 365.
(3) Law Rep. 2 P. C. at p. 388.

and the judgment of the Judicial Committee does not affect the question raised in the present case, which is, whether candles may not be lawful as decorations.

Even if it should be held that the candles in the present case are ornaments, the Court is not concluded by the judgment in *Martin* v. *Mackonochie*. (1) That judgment is at variance with *Westerton* v. *Liddell*. (2) In *Martin* v. *Mackonochie* it is assumed that the Judicial Committee in *Westerton* v. *Liddell* laid down the rule that the term ornaments in the rubric in the Book of Common Prayer means ornaments *prescribed* by the first prayer-book of Edward VI. But the phrase used in at least one part of the judgment in *Westerton* v. *Liddell* (3) is not *prescribed* by, but "*used under*," the first prayer-book of Edward VI. The critical words in *Westerton* v. *Liddell* are "*used under*." There can be no doubt that lighted candles were used under the first prayer-book of Edward VI., and there is no reason why the Court should not adopt the language of the judgment in *Westerton* v. *Liddell*.

Secondly. As to the use of incense, the evidence shews that it was not used during the service. It was not used at morning prayer; it was not used at the communion service.

Cur. adv. vult.

Feb. 3, 1870. SIR R. PHILLIMORE. In this case the office of the judge is promoted by the late Bishop of Winchester against the Rev. Richard Hooker Edward Wix, Vicar of St. Michael and All Angels, Swanmore, in the Isle of Wight.

The case comes before this Court by letters of request from the diocese of Winchester, and Bishop Sumner, having ceased to be bishop of the see of Winchester, continues to be the promoter of the suit.

The defendant is charged with the ecclesiastical offences of adding to the ceremonies and rites prescribed by the law to be used in church, by the burning of lights and the use of incense.

The charges with respect to the burning of lights are contained in the following articles:—

3rd. That the said Richard Hooker Edward Wix, in the church of the said perpetual curacy or vicarage of St. Michael and All Angels, Swanmore, on the

(1) Law Rep. 2 P. C. 365. (2) Moore's Special Report.
(3) Moore's Special Report, at p. 159.

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following Sundays, to wit, on the 7th day of February, on the 28th day of March, on the 18th day of April, and on the 23rd day of May, all in the year 1869, used lighted candles on the communion table in the said church, or on a ledge or shelf immediately above the said communion table; the said ledge or shelf having the appearance of being affixed to and of forming part of the said communion table; during the celebration of the holy communion, at times when such lighted candles were not required for the purpose of giving light, and permitted and sanctioned such use of lighted candles.

5th. That the said Richard Hooker Edward Wix, in the said church on the following Sundays, to wit, on the 28th day of March, on the 18th day of April, and on the 23rd day of May, all in the year 1869, used lighted candles placed in candlesticks standing on each side of the communion table during the celebration of the holy communion, at times when such lighted candles were not required for the purpose of giving light, and permitted and sanctioned such use of lighted candles.

7th. That the said Richard Hooker Edward Wix, in the said church, on Sunday, the 28th day of March, 1869, caused or permitted two lighted candles to be held, one on each side of the priest when reading the gospel, such lighted candles not being then required for the purpose of giving light.

I will deal with the last article first, because it is admitted on behalf of the promoter that the practice therein complained of has been de facto discontinued by Mr. Wix since the service upon him of a monition by the bishop, dated the 3rd of April in last year, and before the commencement of this suit; at the same time Mr. Wix contends that the practice is lawful, and the judgment of the Court is prayed by the promoter thereupon.

I am of opinion that the practice charged in this article is unlawful, as an addition to the rites or ceremonies prescribed by the law. I am glad, therefore, that Mr. Wix obeyed the monition of his ordinary, and must admonish him not to return to the use of this practice.

With respect to the charge contained in the 3rd Article, Mr. Wix offers the following defence in his responsive plea (3rd Article):

He says the charge against him—

Is in part untruly pleaded, for he alleges that on the said days in the said 3rd Article mentioned the said lighted candles were not placed on the communion table, or on a ledge or shelf immediat' ly above the same as therein alleged, but upon a certain other table called a retable, the said retable standing distinct and separate from and not forming or appearing to form part of, and not being affixed or appearing to be affixed to the said communion table.

And he denies that the use of such lighted candles is an un-

lawful addition to or deviation from the forms prescribed by the law.

With respect to the charge in the 5th Article, the defendant admits the fact to be true as stated, but makes a similar denial with respect to the law.

The charges with respect to the unlawful use of incense are contained in the following articles:—

9th. That the said Richard Hooker Edward Wix, in the said church on the following Sundays, to wit, on the 7th day of February, on the 28th day of March, on the 18th day of April, and on the 23rd day of May, all in the year 1869, used incense for censing persons and things in and during the celebration of the holy communion, or as subsidiary thereto, and permitted and sanctioned such use of incense.

The defendant in his responsive plea (Article 9) denies that he on the days in the article mentioned used incense for censing persons and things in and during the celebration of the holy communion, or as subsidiary thereto, or permitted or sanctioned such use of incense as in the said article alleged. And the defendant further says that he used, and permitted, and sanctioned the use of incense on the days in the said article mentioned not for censing persons or things, nor in or during the celebration of the holy communion, nor as subsidiary thereto, but for other and lawful purposes.

11th. That the said Richard Hooker Edward Wix, in the said church on the following Sundays, to wit, on the 7th day of February, on the 28th day of March, on the 18th day of April, and on the 23rd day of May, all in the year 1869, used incense during the celebration of the holy communion, or as subsidiary thereto, and permitted and sanctioned such use of incense.

As to this article, the defendant in his responsive plea (Article 11) denies that he on the days in the said 11th Article mentioned used incense in and during the celebration of the holy communion, or as subsidiary thereto, or permitted and sanctioned such use of incense.

13th. That the said Richard Hooker Edward Wix, in the said church on the following Sundays, to wit, on the 7th day of February, on the 28th day of March, on the 18th day of April, and on the 23rd day of May, all in the year 1869, used incense during Divine service, or as subsidiary thereto, and permitted and sanctioned such use of incense.

As to this article, the defendant in his responsive plea (Article

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13) denies that he used or permitted or sanctioned the use of incense on the days in the said 13th Article mentioned, during Divine service, or as subsidiary thereto, but he admits that he used incense in a proper and lawful manner on the said days.

15th. That the said Richard Hooker Edward Wix, in the said church on the following Sundays, to wit, on the 7th day of February, on the 28th day of March, on the 18th day of April, and on the 23rd day of May, all in the year 1869, ceremonially used incense, and permitted and sanctioned such ceremonial use of incense.

As to this article, the defendant in his responsive plea (Article 15) denies that he on the days in the said article mentioned used incense ceremonially, or permitted or sanctioned such ceremonial use of incense.

It appears from the evidence that what is called the retable is a separate and distinct piece of furniture from the holy table; that it is placed behind the holy table; and that the ledge or shelf of it, to use the words of the witness, "appears like a mantle-piece" over the holy table; that on this retable stood two large candles and twelve branch candles, and that on each side of the holy table there stood a large candlestick which rested on the ground. All these candles were lighted at the time and in the manner which I will now state. And I may remark that the counsel for Mr. Wix admitted very properly that the evidence given by the witness Cooper was substantially correct, and did not cross-examine him. It appears from his evidence that after the third collect for grace had been said, there was a sermon; after which the remaining prayers were said, concluding with the apostolic benediction. After this the candles were lighted by a chorister; there was a procession by the minister and choir then formed, and they went from the church to the vestry. After which another procession came from the vestry with censers and incense burning, went to the holy table, where the priest stirred up the incense, and censed all the things on the retable and holy table, while he himself was censed by a boy behind him. After which the censers and incense were carried by a boy into the vestry, accompanied, it should seem, by one of the priests, another priest remaining at the holy table. After the communion service was over the censers were again fetched from the vestry; another procession was formed, and the

lights were extinguished. There were no lighted candles on the holy table itself; there was no incense burning during the time of the celebration of the eucharist. Between the close of the morning prayers and the beginning of the communion service some of the congregation left the church and other persons came in, and a bell was rung to denote that the communion service had begun. These four facts which are proved in the case are much relied upon by the counsel for Mr. Wix as materially differing the present case from that of *Martin* v. *Mackonochie* (1); so much so as to make this present case one primæ impressionis.

It has been forcibly contended that the two judgments of *Martin* v. *Mackonochie* and *Liddell* v. *Westerton* (2) are irreconcileable in principle, and that I ought to follow the doctrine laid down in the former, and not in the latter case. If, indeed, the duty were cast on me of demonstrating that the two decisions were in every respect harmonious as to the principle on which they proceeded, I might perhaps, though I do not say that I should, find the task a difficult one to execute, more especially with respect to the weight apparently given to the injunctions of Edward VI. in *Liddell* v. *Westerton*, and their entire rejection in *Martin* v. *Mackonochie*, when they were relied upon for the purpose of showing that the burning of two candles to represent the true light of the world was legal. But I am happy to think that no such duty is imposed upon me in the present case. The lights which were burnt in this case were not upon the holy table or "high altar," and therefore are unaffected by the injunctions; and the lighting and the burning of them in the manner and the circumstances proved appears to me to fall under the category of ceremonies. Nor are they, in the language of the Privy Council in *Martin* v. *Mackonochie* (3), "inert and unused," but things actively employed as a part of a ceremony, and are therefore illegal according to my own decision in the same case. It is not necessary that I should pass any opinion upon the legality of these things, if they were decorations, and neither "ornaments" nor ceremonies. It will be remembered that the candles were lit and burning during the whole of the communion service.

(1) Law Rep. 2 P. C. 365. (2) Moore's Special Report.
(3) Law Rep. 2 P. C. at p. 387.

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Now with respect to the use of incense, the principal defence is that it was employed during an interval between two services, and neither belonged to nor was subsidiary to either. I cannot take this view of the state of facts which is proved by the evidence. I think the fair result of that evidence is that incense was used in the interval between two services which would otherwise have immediately succeeded each other; almost the same congregation was present at both services and in the interval between them. It is true that after the incense had been removed a bell was rung to signify that the second service was about to begin; but, looking at all the circumstances, I think it would be unreasonable and unjudicial not to conclude that the burning of the incense was intended to be subsidiary and preparatory to the celebration of the holy communion. I am bound therefore to pronounce that the use of the incense, as well as the lighting and burning of the candles, according to the facts admitted to be proved in this case, were illegal acts, and that Mr. Wix ought to have obeyed altogether, as he did partially, the monitions of his ordinary, which are set forth in the articles, and I must admonish him to abstain from such practices for the future, and I must condemn him in the costs of this suit.

Proctors for promoter: *Moore & Currey.*
Proctors for defendant: *Brooks & Co.*

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Feb. 3.

THE OFFICE OF THE JUDGE PROMOTED BY ELPHINSTONE *v.* PURCHAS.

Ornaments of the Minister—Rites and Ceremonies of the Church.

The rubric at the beginning of the Book of Common Prayer, which provides that "such ornaments of the church and of the ministers thereof at all times of their ministration, shall be retained, and be in use, as were in this Church of England, by the authority of Parliament in the second year of the reign of King Edward the Sixth," authorizes the use of the vestments mentioned in the first prayer-book of King Edward VI.

The following are the vestments which may lawfully be worn by ministers below the order of bishops when officiating at the communion service: the cope, the vestment or chasuble, the white alb plain, the surplice, the tunicle.

The cope may not lawfully be worn except at the communion service.

Semble, at all services, other than the communion service, no other vestment than the surplice may be worn by ministers below the order of bishops, except in

cathedral churches and colleges, where the minister may wear besides his surplice such hood as pertaineth to his degree.

Albs with patches called apparels, tippets of a circular form, stoles, dalmatics, and maniples are unlawful ornaments, and may not be used by a minister during Divine service.

The cap called a biretta may lawfully be used by the minister during Divine service as a protection to the head when needed.

Processions proceeding round the interior of a church, immediately before the commencement of morning or evening service, or immediately after the conclusion of morning or evening service, so conducted as to constitute a rite or ceremony in connection with the service, are illegal.

No addition can be permitted to the rites and ceremonies ordered by the Book of Common Prayer, and the performance during Divine service of any ceremony not prescribed by the Book of Common Prayer is unlawful. The ceremonial use of crucifixes or images during Divine service is unlawful.

It is lawful to administer wine mixed with water, instead of wine, to the communicants at the holy communion, provided that the wine and water be not mixed at the time of the celebration, so as to constitute a new rite or ceremony.

It is lawful to administer to the communicants at the holy communion wafer bread instead of bread such as is usual to be eaten, provided the wafer bread be broken by the priest.

Semble, it is unlawful to administer wafer bread unbroken.

It is lawful to place vases of flowers on the holy table, and to keep them there during the performance of Divine service, provided they are used as decorations only.

The leaving of the holy table wholly bare and uncovered during Divine service is unlawful.

It is lawful for the priest during the prayer of consecration to stand between the people and the holy table with his back to the people.

It is unlawful for the priest to stand in front of the middle of the holy table, with his back to the people, when reading the collects for the day in the communion service, or the collects following the creed, or the epistle.

It is improper for a minister to give notice during Divine service of holidays which the church has not directed to be observed.

THIS case came before the Court by letters of request from the Bishop of Chichester. The defendant did not appear, and the proceedings were carried on in pœnam.

On the 10th of November *A. J. Stephens, Q.C.* (*Archibald, Dr. Tristram,* and *Shaw,* with him), moved the admission of articles. One of the articles charged that the defendant,

At divers times mentioned during the communion service, when reading the prayer for the whole state of Christ's church militant here on earth, made a considerable, unnecessary, and unusual pause of about half a minute after pronouncing the words, "Departed this life in Thy faith and fear;" and made such pause not accidentally, or from any infirmity, but of set purpose and habitually.

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The judge directed this article to be struck out upon the ground that the charge contained in it did not constitute a charge for which a clerk could be made criminally answerable in an ecclesiastical court. The other articles were subject to some amendments admitted to proof. The offences charged in the articles as admitted, and the substance of the evidence offered in support of the charges, appear fully from the judgment.

The case was heard on the 27th and 29th of November, 1869. *A. J. Stephens, Q.C., Archibald, Dr. Tristram,* and *Shaw,* appeared for the promoter. Evidence having been given in support of the charges, they contended that the cope, chasuble, alb, and tunicle, vestments specified in the first prayer-book of Edward VI., could not lawfully be worn by a minister when officiating at the communion service in a parish church. The following is the substance of the argument upon this point. (1)

The question turns entirely upon the construction of the rubric at the commencement of the Book of Common Prayer. It is as follows:—

> And here is to be noted, that such ornaments of the church, and of the ministers thereof, at all times of their ministration, shall be retained, and be in use, as were in this Church of England, by the authority of parliament, in the second year of the reign of King Edward the Sixth.

This rubric evidently points to a retention of what was in use at the time it became law, and in order to arrive at the proper construction of the rubric it is necessary to consider what was the law and practice of the church before and at the time when the Book of Common Prayer received the sanction of the legislature.

It is necessary to go back to the time of Edward VI. The first prayer-book of Edward VI., which was set forth by the authority of the statute 2 & 3 Edw. 6, c. 1, contained directions which required the priest at the communion service to wear a white alb plain (2), with a vestment or cope, and required that in the saying or singing of matins or even-song, baptizing, and burying, the minister

(1) It is not possible to report the argument upon all the points raised in the case without far exceeding the limits of an ordinary report.

(2) The rubrics are set out verbatim in the judgment. It is to be observed that in the rubric at the end of the communion service the words used are *alb or surplice*.

in parish churches should use a surplice. The second prayer-book of Edward VI., set forth by authority of the 5 & 6 Edw. 6, c. 1, contained a direction that the minister at the time of the communion, and at all other times in his ministration, should use neither alb, vestment, nor cope, but, being a priest or deacon, should wear a surplice only. In the reign of Mary these statutes of Edward VI. were repealed, and the practices in use in the church before the Reformation were revived. On the accession of Elizabeth the reformers again gained ascendency. In the first year of Elizabeth an act was passed for the uniformity of common prayer and service in the church. The 25th section of this Act contained the following provision:—

Provided always, and be it enacted, that such ornaments of the church and of the ministers thereof, shall be retained and be in use, as was in this church of England by authority of parliament, in the second year of the reign of King Edward VI., until other order shall be therein taken by the authority of the Queen's Majesty, with the advice of her commissioners appointed and authorized under the great seal of England for causes ecclesiastical, or of the metropolitan of this realm.

It may fairly be presumed from the language of this enactment taken in connection with the ornament rubric (1) in the prayer-book set forth by authority of the statute, that it was the intention of the legislature to authorize for a time only the use of the ornaments specified in the first prayer-book of Edward VI. It was probably deemed inadvisable suddenly to return to the simple ritual enjoined by the second prayer-book of Edward VI., but at the same time power was given to the queen to make further order as soon as circumstances should render such a course prudent. Accordingly, in the seventh year of the reign of Elizabeth, when she was firmly established on the throne, and religious feeling had become comparatively settled, "advertisements" were drawn up and published in accordance with the provisions contained in the statute. These advertisements directed that

In the ministration of the holy communion in *cathedral* and *collegiate churches* the cope should be used, and that in other churches every minister saying any publick prayers or ministering the sacrament should use the surplice only. (2)

(1) This rubric is quoted in the judgment, post p. 78. The word *retained* is not used in the rubric.

(2) The material part of the advertisements are set out verbatim in the judgment, post p. 83.

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It has been said that the advertisements were not issued by the authority of the queen and in the manner required by the statute. At this distance of time it is impossible to prove accurately all that took place with regard to the publication of the advertisements, but there is strong evidence to shew that the requirements of the statute were complied with, and that the advertisements were recognized and enforced as of binding authority in law.

The first draft of the advertisements was prepared in 1564 by Parker, Archbishop of Canterbury, and Grindal, Bishop of London, and three other ecclesiastical commissioners. This draft was sent to Cecil for the queen's approval, but it contained passages to which the queen objected, and the draft was indorsed by Cecil in March, 1564, "not authorized nor published." It appears, however, from the correspondence between Parker and Cecil, that in the following year the advertisements, in an amended form, were laid before Cecil and the queen. On the 12th of March, 1565, Parker wrote to Cecil a letter (1), which contained the following passage:—

> I have stayed upon such advertisements. . . . I have written to the Queen's Majesty, as you see. . . . And where once, this last year, certain of us consulted and agreed upon some particulars of apparel . . . for that by statute we be inhibited to set out any constitutions without license obtained of the prince, I sent them to your honour to be presented; . . . . which I now send again, humbly praying that if not all, yet so many as be thought good may be returned with some authority, at the least way, for particular apparel.

On the 28th of March, 1566, Parker wrote again to Cecil (2):—

> I pray your honour to peruse this draft of letters and the book of advertisements with your pen, which I mean to send to my lord of London. . . . I am now fully bent to prosecute this order and to delay no longer, and I have weeded out of these articles all such of doctrine, &c., which, peradventure, stayed the book from the Queen's Majesty's approbation.

After this we find it stated, in Strype's "Life of Parker," (3)

> That these advertisements came now abroad so well strengthened with authority and menace of animadversions upon disobedience . . . as did mightily awake and terrify such as would or could not comply.

This statement is confirmed by a great number of documents, which shew that after March, 1566, the advertisements were enforced by the prelates and other official personages.

(1) Parker Correspondence. Published by the Parker Society, p. 262.

(2) Parker Correspondence, p. 271.

(3) Vol. i. p. 432.

On the 21st of May, 1566, Grindal, then Bishop of London, wrote to the Dean and Chapter of St. Paul's (1):

These are to require and give you in especyall charge that with all convenyent speed you call before you all and singular the ministers and ecclesiastical persons within your deanery . . . and enjoyne every of them, upon payne of deprivation to prepare forthwith and to wear such habit and apparell as is ordained by the Queen's Majesty's authoritie expressed in the treatie called the advertisements.

In 1569 Archbishop Parker issued articles of inquiry (2), inquiring whether throughout the province of Canterbury the service was said and the sacraments ministered as appointed by "the advertisements set forth by public authority." Cox, Bishop of Ely, in injunctions issued by him about 1570 and 1574, requires "apparel to be worn according to the præcept set forth in the book called advertisements." (3)

In articles (4) presented to Elizabeth in October, 1583, by Whitgift, Archbishop of Canterbury, Piers, Bishop of Salisbury, and Sandys, Bishop of London, in the names of themselves and the Bishops of London, Rochester, Lincoln, Peterborough, and Gloucester, the book of advertisements is mentioned "as sett out by Her Majesty's authoritie." In 1584 and in 1585 Archbishop Whitgift issued articles requiring all in ecclesiastical orders to wear such kind of apparel as prescribed by the Book of Advertisements. (5) In 1603, Thornborough, Bishop of Bristol, issued articles of inquiry (6), in which the authority of the advertisements is recognized. In 1604 the authority of the advertisements was recognized by convocation and by the sovereign, James I. The canons ordained in 1604 were founded upon the advertisements, and if the advertisements were not binding in law, the canons are not valid. (7) The limitation of the use of copes to the principal minister, the gospeller, and the epistler, in cathedral and collegiate

(1) This letter is preserved among the Domestic State Papers of Elizabeth. Vol. xxxix. No. 76.

(2) 1 Cardwell's Doc. Ann. 355.

(3) Second Report of the Ritual Commissioners, App. p. 406.

(4) These articles are preserved among the Domestic State Papers of Elizabeth. Vol. clxiii. No. 31.

(5) 1 Cardwell's Doc. Ann. p. 468; 2 Cardwell's Doc. Ann. 25.

(6) Second Report of the Ritual Commissioners, App. p. 440.

(7) The following are the canons which relate to the apparel of officiating clergy:—

Canon 24: "In all cathedral and collegiate churches the holy communion shall be administered, . . . the principal minister using a decent cope, and being

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churches, and the injunction to use the surplice in parish churches, were the very matters in respect of which the advertisements modified the rubric of Edward's first prayer-book.

But not only were the advertisements thus expressly referred to and recognized from the date of their publication in 1566 down to 1604, but during all that period the prelates of the church were in the habit of denouncing and ordering the destruction of vestments specified in King Edward's first prayer-book, the use of which, unless the advertisements were of binding authority, the law enjoined. Grindal, Archbishop of York, in the year 1571, issued injunctions in which he commanded the churchwardens to see that "all vestments, albs, tunicles, . . . and all other relics and monuments of superstition and idolatry be utterly defaced." (1)

In 1577, Barnes, Bishop of Durham, and others his associates, the queen's commissioners, issued articles of inquiry (2), in which the question is asked, "whether there be any that be known or keep any vestments, tunicles, mass books, . . . or any other such . . . monuments of superstition?" In the same year, Aylmer, Bishop of London, issued articles of inquiry (3), in which one of the matters inquired of is, whether all vestments, albs, and tunicles be utterly defaced and destroyed. Articles of inquiry issued by Sandys, Archbishop of York, in 1578 (4), by Bancroft, Bishop of London, in 1601 (5), and by King, Bishop of London, in 1612 (6), contain similar questions.

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assisted with the gospeller and epistler agreeably according to the advertisements published anno 7 Eliz. . . ."

Canon 25: "In the time of Divine service and prayers in all cathedral and collegiate churches, when there is no communion, it shall be sufficient to wear surplices, saving that all deans, masters, and heads of collegiate churches, canons and prebendaries, being graduates, shall daily, at the times both of prayer and preaching, wear with their surplices such hoods as are agreeable to their degrees."

Canon 58: "Every minister saying the public prayers or ministering the sacraments or other rites of the church, shall wear a decent and comely surplice with sleeves to be provided at the charge of the parish, and if any question arise touching the matter, decency, or comeliness thereof, the same shall be decided by the discretion of the ordinary. . . ."

(1) Second Report of the Ritual Commissioners, App. p. 408.

(2) Raine on Vestments, p. 15.

(3) Second Report of the Ritual Commissioners, App. p. 418, art. 6.

(4) Second Report of the Ritual Commissioners, App. p. 423, art. 32.

(5) Second Report of the Ritual Commissioners, App. p. 438, sec. 5, art. 7.

(6) Second Report of the Ritual Commissioners, App. p. 467, art. 31.

There is the clearest evidence to shew that since the Convocation of 1604 until the passing of the Act of Uniformity in 1662, it was the universal practice in the church for the surplice to be alone worn by the minister in parish churches during the saying of prayers and ministering the sacraments. It appears from the collection of visitation articles printed in the second report of the Royal Commissioners on Ritual, that from 1605 the prelates were in the constant habit of requiring parish ministers to wear the surplice, and no other vestment, while administering the sacraments. (1)

Having regard to all these facts, there is every presumption of law that the advertisements were legally issued, and were of binding authority: *Martin* v. *Mackonochie*. (2) The reasoning by which the Dean of Arches in that case arrived at the conclusion that the injunctions of Edward VI. were issued in accordance with the Proclamation Acts, apply with great force to support the validity of the advertisements of Elizabeth.

Thus, according to the law in force in 1601, when the present prayer-book was framed, the cope, chasuble, alb, and tunicle could not lawfully be worn in a parish church, and this law had been observed universally in the reformed church since the 7th year of Elizabeth.

It is clear that the vestments in question cannot now be lawful, unless their use was restored by virtue of the rubric at the commencement of the present prayer-book. But the effect of the words used in this rubric is not to restore what had become obsolete. The phrase used in the rubric is, "shall be retained and be in use;" and, as regards the ornaments of the minister, the phrase points only to the retention of such ornaments as were then authorized by the law and practice of the reformed church. It is a perversion of language to apply the word *retained* to things that have become unlawful, and have ceased to be in use.

This view of the rubric is borne out by the proceedings at the Savoy Conference, where the real controversy between the con-

(1) The learned counsel quoted a great number of instances. But as the visitation articles are all collected together in the report above-mentioned, it is considered unnecessary to give the references to the passages quoted.

(2) Law Rep. 2 A. & E. 116.

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tending parties related to the retention of the surplice. Although the Puritans said that the rubric *seemed* to restore the vestments specified in Edward's first prayer-book, the bishops did not contend for any such interpretation (1), and did not intend the rubric to bear any such interpretation. Sparrow, who was afterwards Bishop of Exeter, and one of those appointed to assist in revising the prayer-book in 1601, and assisted at the Savoy Conference in 1657, published "A Rationale of the Prayer Book." This book contains the following passage relating to the ornaments to be used in Divine service:—

> The minister, in time of his ministration, shall use such ornaments as were in use in the 2nd Edward VI., rubric 2, viz., a surplice at the ordinary ministration, and a cope at the holy communion, in cathedral and collegiate churches. Queen Elizabeth Art., set forth anno 7."

The 17 & 18 Chas. 2, c. 6, s. 2, has an important bearing on the present question. That was an Act passed only three years after the Act of Uniformity of 1662. The object of the Act was to establish uniformity of common prayer and other the rites and usages of the church in Ireland according to the use of the Church of England. It sets forth a book of common prayer, which does not contain the rubric in question. It is clear that the disputed vestments could not be lawfully used in parish churches in Ireland, and it is equally clear that it was not intended to make any distinction between the use of the church in England and the church in Ireland.

But the construction contended for is not only the construction which was put upon the rubric at the time it was framed, but it is the construction which is supported by the continuous usage of the church ever since. It is beyond question that the cope, chasuble, alb, and tunicle have never been used in parish churches in England since the passing of the Act of Uniformity until within the last few years. This is clearly proved by the documents printed in the second report of the Royal Commission on Ritual. If there is any ambiguity about the meaning of the phrase "shall be retained and be in use," then the words ought to be so construed as to support and validate the long and settled usage of the church. The usage affords a contemporaneous exposition of the rubric, to

(1) Cardwell's Conferences, 350, 351.

which great weight must be attached: *The Magistrates of Dunbar* v. *The Duchess of Roxburgh.* (1)

In the recent case of *Martin* v. *Mackonochie* (2), although the rubric in question was much discussed, no question was raised as to the ornaments of the minister, and the decision of the Judicial Committee of the Privy Council in that case does not affect the present question.

Cur. adv. vult.

Feb. 3, 1870. SIR ROBERT PHILLIMORE. This case comes before me by letters of request from the Bishop of Chichester. The decree by letters of request was served on Mr. Purchas on the 9th of October, and the case was heard during last term. Mr. Purchas has not appeared to the citation, and the proceedings have therefore been carried on in pœnam. I deferred my judgment in order to consider the various authorities that were cited and the arguments adduced by counsel—a burden which pressed the more heavily upon the Court, inasmuch as the case was heard ex parte—and also because some of the same points were raised in a proceeding against Mr. Wix, which was argued before the Court at the beginning of this term, and in which I have just given judgment.

Mr. Purchas is perpetual curate of the perpetual curacy of St. James's Chapel, in the parish of Brighton. The benefice is created by an Act of Parliament, 7 Geo. IV. c. III., which enacts that the repairs shall be executed by a particular person, and that the bread and wine for the holy communion shall be provided by the perpetual curate, but contains no provisions as to churchwardens. The chapel and the perpetual curate are made subject to the ordinary jurisdiction of the Lord Bishop of Chichester. The incumbent of this chapel seems to have no cure of souls. The chapel itself, with a certain portion of the pews and seats, and the rents, profits, and proceeds, are by the statute vested in a person of the name of Nathaniel Kemp, his heirs and assigns (s. 9). The promoter of the office of the judge in this case is described as a colonel in Her Majesty's army, and as "of Brighton;" but I do not remember that it appeared that he is a member of the congregation of the chapel, or in any way connected with it.

The suit, like the preceding one against Mr. Wix, is in form

(1) 3 Cl. & F. 335, 354. (2) Law Rep. 2 P. C. 365.

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criminal; and the articles are fourty-four in number; they underwent some reformation; and now I think the articles of charge are contained in thirty-five of them. They accuse the defendant of various ritual acts and observances, which are said to contravene the Acts of Uniformity and the canons, and the general law of the church. They enter into minute details and specifications—some of a character extremely trivial, which it is impossible not to regret should ever have occupied the time of this Court; but others are of a graver character.

With respect to the evidence given before me in proof of these articles, I think it enough to say that it has been sufficient, with occasional exceptions, which I have noticed in their proper place, substantially to support them.

The most serious matter is that which relates to the wearing of certain vestments by Mr. Purchas and by other officiating ministers with his consent during the celebration of divine service. The articles which contain these charges are as follows:—

XXXIV. That you, the said Rev. John Purchas, in the said church or chapel of St. James's, Brighton, aforesaid, on several occasions (to wit, on the Feast of the Purification of the Virgin Mary, February the 2nd, 1869; Ash Wednesday, February the 10th, 1869; Easter Sunday, March the 28th, 1869; and on Whit Sunday, May the 16th, 1869), used and wore a certain vestment called a cope while performing morning prayer, or parts of the service appointed for morning prayer, and before commencing the communion service as officiating minister. That you also, on several occasions (to wit, on Sunday, November the 1st, 1868, and on Easter Sunday, March the 28th, 1869), while present in the said church or chapel, and responsible as perpetual curate or minister thereof for the due performance of Divine service therein, sanctioned and authorized the wearing of a cope by other officiating clergymen while performing morning prayer, or parts of the service appointed for morning prayer, and before the commencement of the communion service.

XXXV. That you, the said Rev. John Purchas, in the said church or chapel of St. James's, Brighton, aforesaid, on several occasions (to wit, on Sunday evening, January the 31st, 1869, February the 28th, 1869, and Saturday evening, March the 27th, 1869) used and wore a certain vestment called a cope while performing evening prayer, or parts of the service appointed for evening prayer, as officiating minister; and also on several occasions (to wit, on Sunday evening, November the 8th, 1868, January the 17th, 1869, February the 7th, 1869, March the 14th, 1869, March the 21st, 1869, and March the 28th, 1869), while present in the said church, and being responsible as perpetual curate or minister thereof, for the due performance of Divine service therein, sanctioned and authorized the wearing of a cope by other clergymen while performing evening prayer, or parts of the service appointed for evening prayer, as officiating ministers.

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XXXVI. That you, the said Rev. John Purchas, in the said church or chapel of St. James's, Brighton, aforesaid, on several occasions (to wit, Sunday morning, November the 1st, 1868; Sunday morning, November the 8th, 1868; Sunday morning, January the 17th, 1869; Sunday morning, January the 31st, 1869; Sunday morning, February the 7th, 1869; Sunday morning, February the 28th, 1869; Sunday morning, March the 14th, 1869; Monday morning, March the 15th, 1869; and Easter Sunday morning, March the 28th, 1869) used and wore a vestment called a chasuble while officiating in the communion service and in the administration of the holy communion, and on the said days and times, while present in the said church and yourself officiating, and while responsible as perpetual curate or minister thereof, for the due performance of Divine service therein, sanctioned and authorized the wearing of a chasuble by other clergymen while also officiating in the communion service, and in the administration of the holy communion in the said church or chapel.

XXXVII. That you, the said Rev. John Purchas, in the said church or chapel of St. James's, Brighton, aforesaid, on divers occasions (to wit, on Sundays, November the 1st, 1868, November the 8th, 1868, January the 17th, 1869, and February the 2nd, 1869, and on Saturday evening, May the 15th, 1869) caused or suffered certain clergy, forming part of the clergy then officiating or taking part in the ceremonial of Divine service at morning prayer, to wear certain other vestments—to wit, albs with patches called "apparels," and also to wear tippets of a circular form on their shoulders, instead of such surplices or surplices and hoods as are accustomably worn, and on Sunday, February the 7th, 1869, and Good Friday, 1869, you, the said Rev. John Purchas, yourself wore such tippet, as aforesaid.

XXXVIII. That you, the said Rev. John Purchas, in the said church or chapel of St. James's, Brighton, aforesaid, on divers occasions (to wit, on Sunday, November the 8th, 1868, on Sunday, January the 17th, 1869, and other times) at evening prayer wore a scarlet stole embroidered with crosses over your surplice, and at morning service, on Tuesday, February the 2nd, 1869, wore a gold stole over a garment called an alb, and have usually within two years last past worn a stole of some colour during Divine service in your said church or chapel. That on divers occasions (to wit, on Sunday, January the 17th, 1869, Sunday, February the 28th, 1869, and other times within two years last past) you caused or suffered certain of the clergy officiating or assisting at the communion service, in your presence, in the said church or chapel, to wear certain other vestments (to wit, dalmatics, tunics, or tunicles, and albs) instead of surplices, and you yourself also, at such times, when officiating in the communion service, have worn a certain vestment (to wit, an alb) instead of a surplice, and you yourself also then wore, and caused or suffered to be worn by other officiating clergy, a girdle, amice, and maniple; and you also on divers occasions (to wit, on Sunday, February the 28th, 1869, and on divers other days within two years last past) wore, and caused or suffered certain of the other clergy officiating or assisting at the communion service to wear, a stole crosswise, that is to say, crossed over the breast, and you also wore or bore in your hand, and also caused or suffered to be worn or borne in the hand in your presence by other officiating clergy in the said church or chapel on divers occasions (to wit, on Sunday, February the 28th, 1869, and on Easter Sunday, 1869, and Whit Sunday, May the 16th, 1869, and other times within two years last past) a certain cap or covering for the head called a biretta.

XXXIX. That the said vestments in this last and in the four next preceding

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articles mentioned were worn, on the several occasions therein mentioned, as a matter of ceremony by the said clergy whilst so officiating, and were, as a matter of ceremony, of divers colours, and some of them (to wit, the said copes, chasubles, and stoles) of gaudy and variegated colours, the particular hue and pattern of the same being varied, as a matter of ceremony, according to the days and times on which the same were so worn.

The rubric (for I shall use this expression for the sake of clearness), which it is admitted contains the law as to the vestments of the bishop, priest, and deacon, is as follows:—

And here it is to be noted that such ornaments of the church, and of the ministers thereof at all times of their ministration, shall be retained and be in use as were in this Church of England by authority of parliament, in the second year of the reign of King Edward VI.

As to the construction of this rubric, according to the general principles of legal interpretation, I must say that, after a repeated and attentive perusal of the language, it does per se appear to me as plain and simple as any which is to be found in any statutory enactment. Lord Coke says that "loquendum est ut vulgus" is to be assumed as the principle which underlies the language of enactments; and I really do not believe that any person of plain common sense and ordinary intelligence who reads this language, uninfluenced by considerations arising from supposed consequences, would hesitate as to the interpretation of it. He would say, with the Privy Council in *Liddell* v. *Westerton* (1), it "obviously" meant that the same ornaments which were used under the first prayer-book of Edward VI. "may still be used." He would perfectly understand why the Puritan party objected to this rubric, "Forasmuch as this rubric seemeth to bring back the cope, alb, &c., and other vestments forbidden by the Common Prayer Book, 5 & 6 Edw. 6, and so our reasons alleged against ceremonies under our eighteenth general exception, we desire it may be wholly left out" (2); and why the House of Lords should at the same time suggest as a consideration, "whether the rubric should not be mended, where all vestments in time of divine service are now commanded, which were used 2 Edward VI." (3)

And I am convinced that, if the subject to which the language refers were not one which excites some of the strongest passions and feelings of our nature, but was one of an ordinary indifferent

(1) Moore's Special Report, at p. 365. (2) Cardwell's Conferences, p. 314.
(3) Cardwell's Conferences, p. 274.

and civil character, no dispute would ever have been raised with respect to the plain and natural meaning of that language. Much ingenuity has been exerted to show that the obvious meaning is not the true one, and in fact that not only the structure of the sentence must be altered, but other words must be introduced into it before it can receive a legitimate construction. Accordingly it has been argued before me that the rubric in question ought to be read as if the words were as follows:—"That all ornaments which were in use at the time when Charles II.'s Act of Uniformity was passed were henceforth to be retained and used, if they were likewise contained in the first book of Edward VI." It is not too much to say that, before such interpretation can be legally adopted, the departure from the "obvious" meaning of the language employed must be demonstrated to be required by the nature of the subject to which it is applied; and I am thus brought to another consideration, namely, as to the difficulty which is, so to speak, imported from without, or, in other words, the supposed consequences which would flow from the obvious rendering of the language. The consequences which would follow upon the use of the particular vestments specified in the first prayer-book of Edward VI. would, it is alleged, be the restoration of Roman ceremonies in the Church of England, abhorrent to the principles on which her reformation was conducted. In the judgment in *Martin* v. *Mackonochie* (1), I stated at considerable length, citing a great number of authorities in support of the position, what I conceived to be the true legal status of the Church of England with respect to her doctrines and her ceremonies; namely, that as to both, she had regard to the undivided church and to primitive and Catholic doctrine and usage, rejecting those novelties and additions which the Curia of Rome had from time to time imposed upon its subjects. To all that I said upon this matter in the case of *Martin* v. *Mackonochie* I steadily adhere. I do not find that any contrary position was laid down by their Lordships of the Judicial Committee of the Privy Council, and it is a satisfaction to me to be able to add to this list of authorities before cited by me, that of the present Bishop of Ely, who, in his recent charge, places the position of our church upon a similar foundation.

(1) Law Rep. 2 A. & E. 116.

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That very learned prelate says (1):—

"The Reformation here, at least, was intended to be, and in the main became, not a lawless throwing off of lawful authority, not a wanton division from the body of the Church of Christ, but rather a firm and reverent maintenance of the right of each national church to minister its own laws and discipline, and to regulate its own faith and worship, specially when other churches refused reformation, and an external force strove to suppress and smother the cry for it wherever it was raised. We denied, and we still deny, that this was schism; we did not separate from the churches of France or Spain, or Germany or Italy."

And again (2):—

I have tried to turn your thoughts to the earliest ages of the Christian faith; you well know that the professed principle of the English Reformation was a recalling of faith and a re-adjusting of ceremonial to the pattern, as far as possible, of the primitive church.

It is a mistake in law, as well as in history, to conceive that the position of the Church of England with respect to the Roman Church can be ascertained by citations of the violent vituperations to be found during the heat of religious conflict in the writings of some extreme reformers—many of whom, upon examination, will be found to be just as hostile to the present doctrines and ceremonies of England as they were at that time to those of Rome. And this remark is especially applicable to foreign reformers whose churches were constructed on a different basis from that of the Church of England, though perhaps it is not impertinent to observe that the gorgeousness of the vestments and the ritual which the Scandinavian reformers were not afraid to leave to their church, far exceeds any that was contemplated by the first prayer-book of Edward VI.

The principal vestments complained of in this case afford a strong illustration of the truth of my general remark: they are mentioned in the first prayer-book as a "vestment" and a "cope." And when it was argued that the cope could not be legally worn by Mr. Purchas, because it was symbolical of Roman error and corruption, it was admitted that it was specially retained by the existing law as proper, if not absolutely necessary, to be worn in cathedral and collegiate churches. The surplice itself, which it is now contended ought to be worn instead of these vestments, was, and I believe is now, considered by the Presbyterians as one of

(1) Charge, p. 59. (2) Charge, p. 90.

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the worst rags of Popery which the Church of England has retained.

And here, perhaps, it is not irrelevant to advert to the language of Hume in describing the state of parties in England on the eve of the great Rebellion (1):—

But the grievances which tended chiefly to inflame the parliament and nation, especially the latter, were the surplice, the rails placed about the altar, the bows exacted on approaching it, the liturgy, the breach of the Sabbath, embroidered copes, lawn sleeves, the use of the ring in marriage, and of the cross in baptism. On account of these, he adds—

I am not now concerned with the justice of his censure—

were the popular leaders content to throw the Government into such violent convulsions; and, to the disgrace of that age and of this island, it must be acknowledged that the disorders in Scotland entirely, and those in England mostly, proceeded from so mean and contemptible an origin.

I dismiss the argument of consequences from my consideration, and proceed to apply the usual canons of interpretation to the rubric before me.

The rubrics in regard of vestments in the first-prayer book of Edward VI., to which I am referred by the present rubric, were as follows:—

(1.) At the beginning of the communion service—

The priest that shall execute the holy ministry shall put upon him the vesture appointed for that ministration, that is to say, a white alb plain, with a vestment or cope. And where there be many priests or deacons, there so many shall be ready to help the priest in the ministration as shall be requisite, and shall have upon them likewise the vestures appointed for their ministry, that is to say, albs, with tunicles.

(2.) At the end of the communion service:—

And though there be none to communicate with the priest, yet these days (after the Liturgy ended) the priest shall put upon him a plain alb or surplice, with a cope, and say all things at the altar (appointed to be said at the celebration of the Lord's Supper) until after the offertory.

(3.) At the end of the Book of Common Prayer, after the exposition "of ceremonies:"—

In the saying or singing of matins and even-song, baptizing, and burying, the minister, in parish churches and chapels annexed to the same, shall use a surplice; and in all cathedral churches and colleges, the archdeacons, deans, provosts, masters, prebendaries, and fellows, being graduates, may use in the choir, besides their surplices, such hoods as pertaineth to their several degrees which they have

(1) Hume's "History of England," vol. vi. ch. 54, p. 388.

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taken in any university within this realm; but in all other places every minister shall be at liberty to use any surplice or no. It is also seemly that graduates when they do preach should use such hoods as pertaineth to their several degrees. And whensoever the bishop shall celebrate the holy communion in the church, or execute any other public ministration, he shall have upon him, beside his rochet, a surplice or alb, and a cope or vestment; and also his pastoral staff in his hand, or else borne or holden by his chaplain.

These rubrics were abolished by the second prayer-book of Edward VI., which substituted the following:—

The minister at the time of the communion, and at all other times in his ministration, shall use neither alb, vestment, nor cope; but being archbishop or bishop he shall have and wear a rochet, and being a priest or deacon shall have and wear a surplice only.

All these rubrics, and the services to which they belong, were repealed in the reign of Queen Mary (1 Mary, sess. 2, cap. 2).

By the next Act of Uniformity (1 Eliz. c. 2, s. 25) it was enacted—

That such ornaments of the church, and of the ministers thereof, shall be retained and be in use as was in this Church of England by authority of parliament in the second year of King Edward VI., until other order shall be therein taken by the authority of the Queen's Majesty, with the advice of Her Commissioners appointed and authorized under the great seal of England for causes ecclesiastical, or of the Metropolitan of this realm.

Annexed to this statute by s. 2, was the Queen's Prayer Book, the rubric to which was as follows:—

And here it is to be noted that the minister, at the time of the communion, and at all other times in his ministration, shall use such ornaments in the church as were in use by authority of parliament in the second year of the reign of King Edward VI., according to the Act of Parliament set in the beginning of this book.

It will be observed that the words "retained and" which do occur in the Act, were omitted in this rubric; and they do not appear in the rubric of the prayer-book of King James, which is identical with that of Elizabeth.

It is admitted that on the passing of this statute the vestments prescribed by the first prayer-book came into legal use; but it has been contended that Queen Elizabeth exercised the power given her by the statute, and "took other order."

If any such further order were taken in compliance with the statute, it must be in one of four ways:—

(1.) Either by the Injunctions of 1559, or (2) the Advertisements

of 1564–5, or (3) the Canons of 1603–4, or (4) the Canons of 1640. Of these four the advertisements were principally relied upon as the execution of the further order, though the Canons of 1603–4 were also prayed in aid. Before, however, I consider these two modes of execution, I will say a word as to the Injunctions and the Canons of 1640. The injunctions, which I think must upon the whole be considered as having been issued by the royal authority alone, and as not having statutory authority, do not contain any express order with regard to the vestments; but the archbishop and certain bishops afterwards drew up "Interpretations and further considerations of these injunctions for the better direction of the clergy;" among which is to be found the following (1):—

Concerning the Book of Service.

First. That there be used only but one apparel; as the cope in the ministration of the Lord's Supper, and the surplice in all other ministrations.

With respect to the Canons of 1640, they contain no provision as to the subject of vestments. I come therefore to the consideration of the advertisements. Those which refer to the present question are as follows (2):—

Item. In the ministration of holy communion in the cathedrall and collegiate churches, the principal minister shall use a cope, with gospeller and epistoler agreeably; and at all others prayers to be sayde at the communion table, to use no copes but surplesses.

Item. That the deane and prebendaries weare a surplesse with a silke hoode in the quyer; and when they preache in the cathedrall or collegiate churche to weare their hoode.

Item. That every minister sayinge any publique prayers, or ministringe the sacramentes, or other rites of the churche, shall weare a comely surples, with sleeves, to bee provided at the charges of the parishe.

The authority usually referred to with respect to these advertisements is Strype's "Life of Parker" (vol. i. c. 20). Cardwell in his "Documentary Annals," and Hallam in his "Constitutional History" (vol. i. p. 179, 6th ed.), and Collier in his "Ecclesiastical History," dealing with this question of the advertisements, refer as to their principal authority to Strype, in the Annals (vol. i. p. 419, folio), and in his "Life of Parker." And, though by no means always an accurate transcriber, his notes appear to be the fountain from which the history of this matter has been principally derived.

(1) Cardwell's Doc. Ann. vol. i. p. 238. (2) Cardwell's Doc. Ann. vol. i. p. 326.

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Burnet, for instance, relies exclusively upon this authority (Ref. vol. iii. p. 588). The history of these advertisements seems to reflect the doubtful state of all church authority at the time when they were issued. The Puritan party were freely condemning and disregarding the rites and ceremonies of the restored church, and by the influence of their patron, the Earl of Leicester, in the Privy Council, were continually thwarting the various orders put forth by the queen and by the prelates for the purpose of enforcing the uniformity of a decent ritual. The queen, exasperated by the conduct of the Puritans in 1564, ordered the archbishop, with the aid of certain other bishops, members of the ecclesiastical commission, to draw up certain articles or ordinances, the object of which was to secure as great an amount of decent ritual as the circumstances of the time would permit. Archbishop Parker and some of the bishops drew up the articles required; "but," says Strype, "because the book wanted the queen's authority, they thought fit not to term the contents thereof Articles or Ordinances, by which names they at first went, but by a modest denomination, viz., Advertisements." The queen, it is probable from conflicting motives, partly from the influence of Leicester, and partly from an apprehension of weakening the rubric which referred to the second year of Edward VI., refused her official sanction to these advertisements, and as I think Dr. Cardwell correctly states (1),

> Left them to be enforced by the several bishops on the canonical obedience imposed upon the clergy, and the powers conveyed to the ordinaries by the Act of Uniformity. Their title and preface certainly do not claim for them the highest degree of authority; and although Strype infers from certain evidence which he mentions (Parker, vol. i. p. 319) that they afterwards received the royal sanction, and recovered their original title of articles and ordinances, it seems more probable that they owed their force to the indefinite nature of episcopal jurisdiction, supported, as in this instance was known to be the case, by the personal approval of the sovereign.

Collier observes (2) that—

> The advertisements were checked at present by the interposing of the Earl of Leicester, of Knolles, and some other court patrons of the Dissenters; however, afterwards they recovered their first title of ordinances, and were given in charge at a metropolitical visitation in the year 1576.

"A loud outcry," says Mr. Lathbury (History of Book of

(1) Cardwell's Doc. Ann. vol. i. p. 322.

(2) Collier's "Eccles. Hist. of Great Britain," ed. 1840, vol. vi. p. 399.

Common Prayer, p. 72, note 9), "was raised by the Puritans against the advertisements, as though some new rites had been imposed, whereas they were only intended to enforce such as were already in use, because some of the clergy were lax in their practice. They were allowed by the queen to be published, but not under Her Majesty's authority; consequently they never possessed the same force as the injunctions. As, however, they are quoted in the 24th Canon, they are still of some importance. Long after, in this reign, we find the Puritans objecting to the cope as in general use. 'Doe not the people think a more grievous fault is committed if the minister doe celebrate, etc., without a surplesse or a cope, than if the same through his silence should suffer an hundred souls to perish.' (Parte of Register, 45). The cope is mentioned frequently in the same work (62, 84)." I cannot find that Archbishop Parker, anxious as he was to enforce these advertisements, ever said or wrote that they were issued under the authority of the statutes.

I think the fair result of the history derived from printed books on the subject is, that the queen never gave her official or legal sanction to these advertisements, but allowed them to be issued by the prelates with the assurance that they had her personal sanction; and I may add that, to the best of my belief, no legal treatise of authority, and no judgment of a court of justice has ever yet pronounced that these "advertisements" were issued under the conditions which the statute of Elizabeth required.

It is said, however, that though it has been hitherto supposed that these advertisements were issued without the observance of the conditions prescribed in the statute, and therefore illegally, that recent discoveries in the State Paper Office have brought to light documents which establish that these conditions were complied with, and that the advertisements had therefore statutable authority. I am unable to draw so large an inference from the manuscript document, copied from the State Paper Office, which has been submitted to me. It does not seem to me to do more than contain a recital in an informal document, "that the advertisements were sett out by Her Majestie's authoritee," which would not carry the matter further, I think, than the reference to them in the 24th Canon, "according to the advertisements published anno 7 Eliz.," or, as the Latin version has it, "juxta admoni-

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tiones in septimo Elizabethæ promulgatas." It is impossible to conceive that the authority which published these canons was not perfectly aware both of the fact and law relating to these advertisements, and the manner in which they are referred to would rather lead to the inference that they were not at that time considered to have per se a statutable authority. But this point does not appear to me to be of much importance, so far as the present case is concerned, for two reasons: First, there are no prohibitory words, such as were contained in the rubric to the second prayer-book of Edward VI., with regard to the ornaments of ministers—and this omission is worthy of notice—for the gloss which all ecclesiastical history, contemporaneous and subsequent, would give to the advertisements is, that they provided that the ornaments of the minister should not fall below a certain point; not that it should not exceed that point. The object of the advertisements was to give notice that the minimum of ornament mentioned in them would be enforced by authority, just as, with regard to the vestment of the holy table, the 82nd Canon prescribed that it should be "covered with a carpet of silk or other decent stuff," and Dr. Lushington held that this excluded other vestments of the altar; but their lordships, the members of the Judicial Committee of the Privy Council, observed in *Liddell* v. *Westerton* (1) :—

> Next as to the embroidered cloths, it is said that the canon orders a covering of silk, or of some other proper material, but that it does not mention, and therefore by implication excludes more than one covering. Their lordships are unable to adopt this construction. An order that a table shall always be covered with a cloth surely does not imply that it shall always be covered with the same cloth, or with a cloth of the same colour or texture. The object of the canon seems to be to secure a cloth of a sufficiently handsome description, not to guard against too much splendour.

This view that, where it was intended to prohibit as well as to prescribe, express words of prohibition were used, is further confirmed by the language of the advertisements themselves; for instance (2), the advertisement which relates to prayers to be said in cathedrals at the holy table, when there is no celebration of the eucharist:—

> Item in ministration of the holy communion in the cathedrall and collegiate churches, the principall minister shall use a cope with gospeller and epistoler

(1) Moore's Special Report, at p. 188. (2) 1 Cardwell's Doc. Ann. vol. i. p. 326.

agreeably, and at all other prayers to be sayde at the communion table to use no copes, but surplesses.

It was more faintly argued that, even if the advertisements did not execute the power given by statute, the Canons of 1603–4 had this effect. Upon this argument it is to be observed, in the first place, that they contain no prohibitory words; and it is upon this very ground that one of them, as I have already said, which gave directions as the covering of the holy table, was held by the Privy Council not to be exhaustive, or to exclude the use of other coverings. In the second place, it is, to say the very least, questionable whether the words "by the authority of the Queen's Majesty," with the approval of the particular persons mentioned therein, could confer any power upon the succeeding monarch. And, thirdly, the Canons of 1603–4 were made in convocation with the consent of the Crown and under the Statute of Henry VIII. (25 Hen. 8, c. 19), and were the creatures of the distinct ecclesiastical legislature known to the constitution of this country; and it seems to me impossible to hold, because the Crown ratified what the convocation did, that a canon so enacted by convocation under the statute of Henry VIII. could be an execution of a power under a totally different statute. And it is, moreover, fatal to the argument, that the metropolitan was not a member of this convocation, as appears by the recital in the Crown's writ prefixed to the canons, the Bishop of London presiding during the vacancy of the see. Lastly, and this remark applies equally to the advertisements, unless the words "be retained" are to have a special construction put upon them—a subject which I will presently consider—a subsequent statute, which expressly revived a prior statute inconsistent with the advertisements of Queen Elizabeth, would, by necessary implication, repeal them.

I have already observed that the words "be retained" are in the statute, though not in the prayer-book of Elizabeth. Now, is there any reason for supposing that this variance was intentional or significant? or was the variance accidental and insignificant, because the words were treated as an amplification of the words "be in use"? I think the last is the true solution, and certainly the Privy Council, in *Liddell* v. *Westerton* (1), were of this opinion;

(1) Moore's Special Report, at p. 259.

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they had to construe the words "be retained" as well as the words "be in use"; they drew no distinction between the two expressions; they did not rule that the ornaments of the church could not be legal unless they satisfied the double condition of being in use at the time when the rubric of Charles II. became law, and also of their being prescribed by the prayer-book of Edward VI. On the contrary, referring to the difference of language between the statute and the rubric of Elizabeth, they said (1):—

> It will be observed that this rubric does not adopt precisely the language of the statute, but *expresses the same thing in other words*. The statute says, "such ornaments of the church and of the ministers thereof shall be retained and be in use;" the rubric, "that the minister shall use such ornaments in the church."

In truth, there would be an insuperable difficulty in satisfying the supposed condition that the ornaments must have been de facto in use; for what ornaments were in use at the time of the Restoration? The churches had been for many years in the possession of the Presbyterians—where they had not been driven out by the Independents; neither Catholic doctrine nor ritual could be found in the churches until after St. Bartholomew's Day.

Nor is the difficulty lessened if the condition be interpreted to imply that the ornaments must be de jure in use; that would take us back, passing over the Protectorate of Cromwell, to the last year of Charles I.'s reign—that is, if my observations as to the advertisements and canons are correct, to the Elizabethan Act of Uniformity—and would give a meaning to the words "be retained" in Charles II.'s rubric, which, it is admitted, they had not in Elizabeth's Act of Uniformity.

Bearing in mind the importance of the question, I have endeavoured not to shrink from any part of the arduous duty which has devolved upon me. But I am bound to say that I think this rubric has already received a construction from an authority which is binding upon me. It has been twice considered and elaborately reviewed by the Judicial Committee of the Privy Council—first, in the case of *Liddell* v. *Westerton* (2); secondly, in the case of *Martin* v. *Mackonochie* (3)—and in both instances precisely the same construction was put upon it.

(1) Moore's Special Report, p. 159. (2) Moore's Special Report.
(3) Law Rep. 2 P. C. 365.

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In *Liddell* v. *Westerton* (1) the language was as follows:—

Their Lordships, after much consideration, are satisfied that the construction of this rubric which they suggested at the hearing of the case is its true meaning, and that the word "ornaments" applies, and in this rubric is confined, to those articles the use of which in the services and ministrations of the church is prescribed by the prayer-book of Edward VI.

The term "ornaments" in ecclesiastical law is not confined, as by modern usage, to articles of decoration or embellishment, but it is used in the larger sense of the word "ornamentum," which, according to the interpretation of Forcellini's Dictionary, is used "pro quocumque apparatu, seu instrumento." All the several articles used in the performance of the services and rites of the church are "ornaments"; vestments, books, cloths, chalices, and patens are amongst church ornaments; a long list of them will be found extracted from Lyndwood, in Dr. Phillimore's edition of "Burn's Ecclesiastical Law," vol. i. pp. 375–7. In modern times organs and bells are held to fall under this denomination.

When reference is had to the first prayer-book of Edward VI., with this explanation of the term "ornaments," no difficulty will be found in discovering amongst the articles, of which the use is there enjoined, ornaments of the church as well as ornaments of the ministers. Besides the vestments differing in the different services, the rubric provides for the use of an English bible, the new prayer book, a poor-man's box, a chalice, a corporas, a paten, a bell, and some other things.

In *Martin* v. *Mackonochie* (2) their lordships say:—

The construction of this rubric was very fully considered by this committee in the case of *Westerton* v. *Liddell*, already referred to; and the propositions which their lordships understand to have been established by the judgment in that case may thus be stated:—

First: The words "authority of parliament" in the rubric refer to and mean the Act of Parliament 2 & 3 Edw. 6, c. 1, giving parliamentary effect to the first prayer-book of Edward VI., and do not refer to or mean canons or royal injunctions, having the authority of parliament, made at an earlier period.

Second: The term "ornaments" in the rubric means those articles, the use of which, in the services and ministrations of the church, is prescribed by that prayer-book.

Third: The term "ornaments" is confined to these articles.

Fourth: Though there may be articles not expressly mentioned in the rubric, the use of which would not be restrained, they must be articles which are consistent with, and subsidiary to, the services: as an organ for the singing, a credence table from which to take the sacramental bread and wine, cushions, hassocks, &c.

In these conclusions, and in this construction of the rubric, their lordships entirely concur.

It certainly would seem at first sight that these judgments have made my course plain. I have, in obedience to them, but to inquire whether these "ornaments of the minister" are to be

(1) Moore's Special Report, at pp. 156–7.
(2) Law Rep. 2 P. C. at p. 390.

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found in the first prayer-book of Edward VI. If they are, to pronounce them legal; if not, illegal.

Two objections are raised to the application of the plain and clear language of these judgments to the present case. First, it is said that the question of the ornaments of the minister was not directly before the Court in *Liddell* v. *Westerton* (1), but only the ornaments of the church; and this is literally true; but how little can it avail to prevent the application of the same rule to both kinds of ornament. The reasoning covers equally both kinds of ornament. The common rules of grammar and sense require that I should not divide a sentence and apply a predicate, equally applicable to both subjects contained in it, to one only. I am not at liberty, if I were so inclined, to question the judgment as to the ornaments of the church, nor would it become me to express any doubt as to the logic on which it is built. I am bound to follow where that judgment leads me; and, if so, I must on the like premises arrive at the like conclusion.

Secondly, it is objected that the words "shall be retained" modify the application of the judgment in *Liddell* v. *Westerton* to the case before me.

But in what way do these words produce this effect? Because they are equally applicable to both classes of ornaments, and must have been fully considered by the Privy Council in both the judgments, and in neither was any attempt made to lay a particular stress upon them, much less to attach to them the important consequences with which it is now sought to make them pregnant.

I must not omit to notice the argument drawn from the Visitation Articles since the statute of Charles II., and the alleged "contemporanea expositio" afforded by them, and by the fact of the non-usage of the vestments in question. First, as to the Visitation Articles, the same principle applies to them as to the advertisements and canons, and indeed as to every attempt to procure a decent ritual since Queen Elizabeth's time; namely, that the authorities were content to order the minimum of what was requisite for this purpose, having—for the reasons which I have explained in my former judgment in *Martin* v. *Mackonochie* (2)—

(1) Moore's Special Report. (2) Law Rep. 2 A. & E. at pp. 174–90.

great difficulty in obtaining even that minimum. And so with regard to the argument as to the legality of a church-rate for objects of ritual, I have nothing to add to the observations which I made in that case as to the insufficiency of this argument (p. 201). Nor is it necessary to repeat what was said in that case, and the preceding case of *Liddell* v. *Westerton* (1), that no amount of desuetude can repeal the obligations of a statute, much less render its provisions unlawful. But it has been urged that the admitted disuse, till within a very recent period, of these ornaments since the Restoration affords a "contemporanea expositio" which removes all doubt as to the meaning of the rubric. In the first place, this argument implies that the words of the rubric are such as to raise a doubt, whereas in themselves the words are perfectly plain and clear. In the second place, the disuse is practically accounted for by the circumstances to which I have just adverted in dealing with the argument from the Visitation Articles. In truth, however, the argument is bad from the vice of proving a great deal too much; the same argument would make the copes in the cathedrals unlawful, which, it is admitted, they are not; the use of the surplice in preaching unlawful, which is the proper dress; and è converso would establish the legality of the use of the black gown, which has no warrant of law, and would render unlawful the credence table, and this last ornament affords a special illustration of the inapplicability of this argument. At the time of the decision in *Liddell* v. *Westerton* the credence table had been almost universally disused; I believe there were not half a dozen exceptions throughout England; and this disuse had led to a continued and universal violation of the rubric, in placing the elements upon the holy table before the commencement of the service, which, as their lordships observed, was "certainly not according to the order prescribed." Their lordships, therefore, disregarded this usage, and sanctioned the credence table, because it enabled the provisions of the rubric to be executed. And so the doctrine of the contemporanea expositio was strongly urged against the lawfulness of the cross, either as an ornament or as a decoration; the disuse of it in the Church of England was clearly established, but their lordships thought that the circumstances of the time fully accounted for

(1) Moore's Special Report.

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this, and, in spite of their proved disuse in the churches of this country, said (1): "*That crosses, as distinguished from crucifixes, have been in use, as ornaments of churches, from the earliest periods of Christianity; that when used as mere emblems of the Christian faith, and not as objects of superstitious reverence, they may still lawfully be erected as architectural decorations of churches.*"

Nor upon this head is it to be omitted that, though the effect of this rubric in bringing back the vestments of Edward VI. had been pointed out by the Puritans in Charles the First's time, as I have stated, no denial of this consequence was ever given by the authorities on behalf of the church; and that subsequently to the date of this rubric no judicial authority, no legal commentator, has questioned the effect of this rubric in legalizing the vestments of the second year of Edward VI.

Burn, in the third volume of his "Ecclesiastical Law," after reciting the rubric in the present prayer-book, proceeds as follows (p. 437):—

Therefore it is necessary to recur in this matter to the Common Prayer-Book established by Act of Parliament in the second year of King Edward VI., in which there is this rubric:—"In the saying or singing of *matens* and *evensonge*, *baptyzyng* and *burying*, the minister in paryshe churches, and chapels annexed to the same, shall use a *surples*. And in all cathedrall churches and colledges the archdeacons, deanes, provestes, maisters, prebendaryes, and fellowes, beinge graduates, may use in the quiere, beside theyr surplesses, such hoodes as pertaineth to their several degrees whiche they have taken in any universitie within this realme. But in all other places every minister shall be at libertie to use any surples or no. It is also seemly that graduates, when they dooe preache, should use suche hoodes as pertayneth to theyr several degrees."

So that in marrying, churching of women, and other offices not here specified, and even in the administration of the holy communion, it seemeth that a surplice is not necessary. And the reason why it is not enjoined for the holy communion in particular is because other vestments are appointed for that ministration, which are as followeth:—"Upon the day, and at the time appointed for the minisstracion of the holy communion, the priest that shall execute the holye ministry shall put upon hym the vesture appointed for that ministracion, that is to say, a white *albe* plain, with a vestment or *cope*. And where there be many priestes or deacons, there so many shall be ready to helpe the priest in the ministracion as shall be requisite, and shall have upon them likewise the vestures appointed for their ministry, that is to say, *albes*, with *tunacles*."

NOTE.—The albe differs from the surplice in being close-sleeved.

"And whensoever the byshop shall celebrate the holye communion in the churche,

(1) Moore's Special Report, at p. 175.

or execute any other publique ministracion, he shall have upon him, besyde his rochette, a surples or albe, and a cope or vestment, and also hys pastoral staffe in hys hand, or elles borne or holden by hys chaplyne."

Mr. Stephens, in his elaborate edition of the Book of Common Prayer, published for the Ecclesiastical History Society, after citing the foregoing rubrics, says (vol. i. p. 367):—

All the rubrics just quoted were omitted in 1552, and never appeared again. The only rubric respecting ornaments in the second common prayer-book of Edward VI., confirmed likewise by Act of Parliament, was directed against the use of the cope and pastoral staff. These ornaments, however, were again introduced by the rubric of 1559, which brought us back not to the second book of Edward VI., but to the first. And this rubric of 1559, slightly altered, was a second time authorized at the last review.

Copes were worn at Durham and Westminster till the middle of the last century, and copes are worn now by the bishops at the coronations; indeed all the directions contained in the first book of Edward VI., as to the ornaments of the church and of the ministers thereof at all times of their ministration, are by statute 14 Car. 2, c. 4, the statute law of the Anglican Church.

In October, 1864, a commission under the Clergy Discipline Act was issued by the late Bishop of Exeter, to inquire into certain charges against the curate of Helston, the principal one being the use of the surplice in preaching. The bishop, in his judgment upon this point, after stating the several statutes and rubrics, says:—

From this statement it will be seen that the surplice may be objected to with reason; but then it must be because the law requires "a white alb plain, with a vestment or cope." Why have these been disused? Because the parishioners—that is the churchwardens, who represent the parishioners—have neglected their duty to provide them; for such is the duty of the parishioners by the plain and express canon law of England [Gibson, 200]. True it would be a very costly duty, and for that reason, most probably, churchwardens have neglected it, and archdeacons have connived at the neglect. I have no wish that it should be otherwise. But, be this as it may, if the churchwardens of Helston shall perform this duty, at the charge of the parish, providing an alb, a vestment, and a cope, as they might in strictness be required to do (Gibson, 201) I shall enjoin the minister, be he who he may, to use them. But until these ornaments are provided by the parishioners, it is the duty of the minister to use the garment actually provided by them for him, which is the surplice.

This judgment will be found reported in Mr. Stephen's Book of Common Prayer, vol. i. p. 378, and in his "Ecclesiastical Statutes," vol. ii. p. 2046.

I do not know how I can better close my observations upon this

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subject than by reciting the language of the Privy Council in *Liddell* v. *Westerton* (1):—

> The rubric to the prayer-book of January the 1st, 1604, adopts the language of the rubric of Elizabeth. The rubric to the present prayer-book adopts the language of the statute of Elizabeth; but they all obviously mean the same thing, that the same *dresses* and the same utensils or articles which were used under the first prayer-book of Edward VI. may still be used.

3 P C 644

I am of opinion that the plain words of the statute, according to the ordinary principles of interpretation, and the construction which they have received in the two judgments of the Privy Council, oblige me to pronounce that the ornaments of the minister mentioned in the first prayer-book of Edward VI. are those to which the present rubric referred; and I cannot therefore pass any ecclesiastical sentence against Mr. Purchas for wearing them.

1 Ap Cas 242

The next question is, what are these ornaments? They are, for ministers below the order of bishops, and when officiating at the communion service, cope, vestment or chasuble, surplice, alb, and tunicle; in all other services the surplice only, except that in cathedral churches and colleges the academical hood may be also worn. The other vestments worn by Mr. Purchas, and the cope at any other time but the communion service, are unlawful, and may not be worn. It is unlawful, therefore, for Mr. Purchas to wear or authorize to be worn, a cope at morning or at evening prayer; albs with patches called apparels, tippets of a circular form, stoles of any kind whatsoever, whether black, white, or coloured, and worn in any manner; dalmatics and maniples, which latter ornament, it appears from the evidence, was worn on one occasion by one of the officiating clergymen, though it does not appear that Mr. Purchas wore one himself. As to the girdle and the amice, it is not proved that Mr. Purchas wore them or suffered them to be worn.

With respect to the covering or cap called a "biretta," (2) which Mr. Purchas was proved to have carried in his hand, and a clergyman to have worn in a procession, it appears to me as innocent an ornament as a hat or a wig, or as a velvet cap, which latter is not uncommonly worn by bishops, clergy, and laity as a protection to the head when needed. The 74th Canon, which is still in force, and which enjoins decency of apparel to ministers when out of

(1) Moore's Special Report, at p. 159. (2) Article 38, ante p. 77.

their houses, provides that "no ecclesiasticall persons shall weare any coife or wrought night-caps, but onely plaine night-caps of blacke silke, sattin, or velvet." And the 18th Canon provides that "no man shall cover his head in the church or chappell in the time of Divine service, except he have some infirmity, in which case let him wear a nightcap or coife," which word "nightcap" is not to be understood as a covering worn in bed, but as a kind of close-fitting cap, as is shown by the words in the Latin canons, "pileolo aut ricâ." And I do not pronounce this particular kind of black cap, called a biretta, so worn, to be unlawful.

With respect to the colour of the vestments, which I have pronounced to be lawful, the rubric is silent, except in the case of the alb and surplice; and the expert in such matters, who was produced as an authority by the promoter, deposed that the vestments which were used in Mr. Purchas's church were in every respect such as were in use in the Church in the second year of Edward VI.

There are various charges relating to particular kinds of processions organized by Mr. Purchas in his church, which I will now deal with. They are to be found in the following articles:—

IV. That you, the said Rev. John Purchas, on the several occasions in this article hereinafter-mentioned, in the said church or chapel of St. James's, Brighton (to wit, on Sunday morning, November the 1st, 1868; on Christmas Eve, 1868; on Christmas Day morning, 1868; on Sunday morning, December the 27th, 1868; on Easter Eve, March the 27th, 1869; on Easter Day morning, March the 28th, 1869; and on Whit Sunday morning, May 16th, 1869; on Sunday evening, January the 24th, 1869; on Sunday evening, February the 28th, 1869; on Saturday evening, May the 15th, 1869; and on Whit Sunday evening, May the 16th, 1869), immediately before, but at the hour appointed for the commencement of the prayers appointed to be read at morning and evening service respectively, and *without any break or interval and as connected with and being the beginning of and a part of the rites and ceremonies of public worship on the said several occasions*, in the presence of the congregation then assembled in the said church or chapel of St. James's, Brighton, for the purpose of hearing Divine service, formed, or caused to be formed, a procession composed of a thurifer carrying an incense-vessel containing incense, swinging the same; a crucifer bearing a crucifix, or large cross, with a figure of the Saviour thereon; two acolytes, or boys dressed in red and white, with red skullcaps on their heads and bearing lighted candles; several deacons, or other persons, bearing one or more silk banners, with a cross or other device embroidered on each of such banners; divers choristers dressed in red and white; a person, called a ceremoniarius, in cassock and cotta, with blue tippet; two persons, called rulers of the choir, in copes; you, the said Rev. John Purchas, and the other officiating minister of the day, in copes: that the procession so formed proceeded round the said church or chapel of St. James's, singing a certain hymn,

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being No. 100 of the hymns contained in a book called "Words of the Hymnal Noted," or some other hymn from the same book; and that immediately on the return of each of such processions on each of the said several occasions to the choir, the prayers for the day were commenced; and that on a certain other occasion, to wit, on Sunday, February the 28th, 1869, immediately after the benediction at evening service, and *without any break or interval, and as connected with and forming the conclusion of and part of the rites and ceremonies of public worship*, formed, or caused to be formed, a like procession to the one immediately hereinbeforementioned, and proceeded therewith round the said church, singing as aforesaid in the presence of the congregation assembled.

XIV. *That you then*—

that is, after doing certain acts, which fall under another category, and which I will consider presently—

formed, or caused to be formed, a procession consisting of a thurifer with his incense vessel containing incense, the crucifer with a large crucifix, acolytes or boys with lighted candles, the person called ceremoniarius, an assistant minister, and you, the Rev. John Purchas, in a cope, followed by several members of the congregation each with a lighted candle; that the procession so formed proceeded round the interior of the said church or chapel singing; that thereupon afterwards you, the said Rev. John Purchas, took off your cope, and wearing a white alb with gold stole and chasuble, proceeded to the communion table, and, after being yourself censed, commenced the communion service, during the reading of which the congregation extinguished their candles. That after the collect and epistle had been read the said candles were, during the reading of the gospel, again lighted and were then again extinguished, each of the acts in this article hereinbefore set forth, being of the nature of and intended by you as and constituting a religious ceremony.

XXVI. That you, the said Rev. John Purchas, in the said church or chapel of St. James's, Brighton, aforesaid, on the Sunday next before Easter, March the 21st, 1869, at morning service, and during or immediately after the conclusion of morning prayer, and before the commencement of the communion service, sprinkled or caused to be sprinkled with so-called holy water, and blessed or consecrated, or caused to be blessed or consecrated, and censed, or caused to be censed, divers palm branches then lying on a table placed near to the communion table, and that after the said morning prayer was concluded you caused the said palm branches to be distributed to yourself and to divers other clerks in holy orders, to persons of the choir and members of the congregation then and there present in the said church or chapel; and that *you then caused to be formed a procession* in the said church or chapel, with a crucifix borne before it, and consisting of the thurifer, choristers, priests, and others, which said procession then proceeded round the interior of the said church or chapel, chaunting, and elevating the said palm branches, and accompanied with lighted candles; and that on the return of the procession the communion service was immediately commenced and proceeded with, the whole taking place in the presence of the congregation then assembled to hear Divine service as a part of Divine service, and as a ceremony connected therewith, without break or intermission.

It appears to me from the evidence that these particular processions have been so conducted as to constitute a further rite or

ceremony in connection with the morning and evening service, and in addition to those prescribed by the rubrics for those services. I must, therefore, placing them under this category, pronounce them illegal.

The following articles, which I have grouped together, contain charges against Mr. Purchas for using, during the time of, or so immediately connected with, the prescribed service as to be practically undistinguishable from it, rites or ceremonies other than and additional to those prescribed in the Book of Common Prayer:—

V. That on a certain occasion (to wit, on Sunday morning, November the 1st, 1868), you, the said Rev. John Purchas, in the said church or chapel of St. James's, Brighton, aforesaid, caused a group of acolytes, or attendants, to stand or kneel round you, and a person called the crucifer to stand by the side of you, bearing a crucifix or gilt cross, with the figure of the Saviour thereon, as a matter of ceremony during the reading by you, the said Rev. John Purchas, of the gospel in the communion service; that on certain other occasions (to wit, on Easter Eve 1869, Saturday evening, May the 15th, 1869, and on Whit Sunday evening, May the 16th, 1869), the "Te Deum" being on each of such occasions sung as a part of evening service immediately after the evening prayers, in the said church or chapel of St. James's, Brighton, aforesaid, the congregation remaining in the said church or chapel during the singing thereof, you, the said Rev. John Purchas, during the singing thereof, caused the said crucifer, with his said crucifix, and the bearers of banners, to stand holding the same as a matter of ceremony near to you, the said Rev. John Purchas, and in front of the holy table.

XIII. That you, the said Rev. John Purchas, did, in the said church or chapel of St. James's, Brighton, aforesaid, on Ash Wednesday, February the 10th, 1869, at morning service, immediately after the conclusion of the commination, and before commencing the communion service (you being then the officiating minister), proceed as a matter of ceremony in connection with the Divine service of the day, to take from the holy table a certain vessel, previously placed thereon, filled with a black powder being or resembling ashes; and did then bless or consecrate the same, and did then rub a portion of such powder on the foreheads of certain persons, members of the congregation, who then knelt before you for that purpose (to wit, a certain other clergyman then present, the person called the ceremoniarius, a person called a ruler of the choir, and certain acolytes, or boys); and did further then publicly invite any other members of the congregation to come forward for the like purpose; after which, none others having come forward, the communion service was commenced and proceeded with.

XIV. That you, the said Rev. John Purchas, on the day of the purification of the Virgin Mary, February the 2nd, 1869, in the said chapel or church of St. James's, Brighton, aforesaid, in the morning, and when no artificial light was necessary, during the performance of divine service, to wit, while the litany was being read, censed or caused to be censed, and afterwards sprinkled or caused to be sprinkled with holy water, or water previously blessed or consecrated, a number

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of candles then placed and being on a small table close to the communion table, and that you then, after the litany was finished and before the commencement of the communion service, lighted the said candles and distributed them to divers members of the congregation, who then, by your direction or sanction, held up the same so lighted.

The charges contained in the latter part of this article I have already considered.

XXI. That you, the said Rev. John Purchas, in the said church or chapel of St. James's, Brighton, aforesaid, on divers occasions (to wit, on the morning of Sunday, January the 31st, 1869; Sunday, February the 7th, 1869; Sunday, February the 28th, 1869; Sunday, March the 14th, 1869; Sunday, March the 21st, 1869; Easter Sunday, March the 28th, 1869; and Whit Sunday, May the 16th, 1869), caused a small bell to be rung divers times during the prayer of consecration in the service of the holy communion, such ringing being simultaneous and connected with the consecration of the elements, and with the elevation of them, as in the preceding articles mentioned.

XX. That you, the said Rev. John Purchas, on several occasions, in the said church or chapel of St. James's, Brighton, aforesaid (to wit, on Sunday, December the 27th, 1868; Sunday, January the 17th, 1869; Sunday, January the 31st, 1869; Sunday, February the 7th, 1869; and Whit Sunday, May the 16th, 1869), caused to be said or sung, before the reception of the elements and immediately after the prayer of consecration in the communion service, the words or hymn or prayer commonly known as "The Agnus," that is to say:—'O Lamb of God that takest away the sins of the world, have mercy on us;' which said words are appointed to be said only as a part of the said hymn or prayer at the conclusion of the said service, namely, after the reception of the elements by the communicants is completely ended, and after the Lord's Prayer and the other prayer then appointed and the gloria have been said, and immediately before the final blessing.

XXVIII. That you, the said Rev. John Purchas, in the said church or chapel of St. James's, Brighton, aforesaid, on Sunday, March the 14th, 1869, at evening service, and immediately on the conclusion of your sermon, gave notice that on the next day there would be "a mortuary celebration for the repose of a sister at eleven o'clock;" and that on Monday morning, March the 15th, 1869, while performing Divine service in the said church or chapel, namely, while reading the communion service, immediately after the collect for the queen, and before the epistle, you interpolated and said the following words, that is to say:—"O God! whose property is ever to have mercy and to forgive, be favourable unto the soul of this thy servant" (thereby meaning the soul of the deceased person for whose repose the said mortuary celebration was made), "and blot out all her iniquities, that she may be loosed from the chains of death and be found meet to pass unto the enjoyment of life and felicity through Jesus Christ our Lord. Amen." After which 1 Thess. iv. 13 to 18, was read as the epistle, and the rest of the service was proceeded with, John vi. 37 to 40, being read as the gospel.

XXXIII. That you, the said Rev. John Purchas, in the said church or chapel of St. James's, Brighton, aforesaid, on Whit Sunday evening, May the 16th, 1869, at the usual hour for, and immediately before the commencement of evening prayer, and in the presence of the congregation then assembled to hear Divine

service, made, received, or admitted a new acolyte or choir boy, by causing him then to kneel on one of the steps before the holy table, and reading some words or sentences out of a book, and making the sign of the cross over him, and putting into his hands a candlestick with candle, and afterwards, in like manner, putting into his hands decanters or glass bottles of wine and of water, those actions collectively being intended as and constituting a religious rite or ceremony.

I think these articles are substantially proved; and that in these circumstances the additional rites or ceremonies must be considered as illegal, on the principle of the decision in *Martin* v. *Mackonochie* (1); and I accordingly admonish Mr. Purchas to abstain from the use or sanction of the particular rites and ceremonies so charged for the future.

I now approach the consideration of a group of articles which have been proved, and which appear to me to be expressly governed by the judgments in *Martin* v. *Mackonochie* (1) and *Flamank* v. *Simpson*. (2) They are as follows:—

VIII. That you, the said Rev. John Purchas, in the said church or chapel of St. James's, Brighton, aforesaid, did, on the said 8th day of November, 1868, the 17th day of January, 1869, and the 16th day of May, 1869, cense or permit to be censed, during Divine service, the said crucifix, so placed and standing on the said holy table or narrow ledge as in the 6th preceding article mentioned.

X. That you, the said Rev. John Purchas, in the said church or chapel of St. James's, Brighton, aforesaid, on divers occasions (to wit, on Sunday, February the 28th, 1869; on Sunday, March the 14th, 1869; on Sunday, March the 21st, 1869; and on Easter Sunday, March the 28th, 1869) used lighted candles on the holy table or communion table (or on a ledge immediately over the said table, and appearing and intended to appear part thereof), during the celebration of the holy communion, as a matter of ceremony, and at times when such lighted candles were not wanted for the purpose of giving light, and permitted and sanctioned such use of lighted candles.

XII. That you, the said Rev. John Purchas, in the said church or chapel of St. James's, Brighton, aforesaid (on the day of the purification of the Virgin Mary, February the 2nd, 1869; on Sunday, February the 7th, 1869; on Sunday, February the 28th, 1869; on Sunday, March the 14th, 1869; on Sunday, March the 21st, 1869; on Easter Sunday, March the 28th, 1869; and on Whit Sunday, May the 16th, 1869) used incense for censing persons and things, and for other purposes, as a matter of ceremony, in and during the celebration of the holy communion, and also in and during other parts of Divine service, and there permitted and sanctioned such use of incense.

XV. That you, the said Rev. John Purchas, in the said church or chapel of St. James's, Brighton, aforesaid, in and during the communion service, on divers occasions (to wit, on Christmas Day, 1868; on Sunday, December the 27th,

(1) Law Rep. 2 A. & E. 116; Law Rep. 2 P. C. 365.

(2) Law Rep. 1 A. & E. 276; Law Rep. 1 P. C. 463.

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1868; on Sunday, February the 7th, 1869; on Ash Wednesday, February the 10th, 1869; on Sunday, February the 28th, 1869; on Sunday, March the 14th, 1869; and on Easter Sunday, March the 28th, 1869), during the celebration of the holy communion, and as part of the ceremonies thereof, mixed water with the sacramental wine used in the administration of the holy communion, and permitted and sanctioned such mixing and the administration to the communicants of the wine and water so mixed.

XVII. That you, the said Rev. John Purchas, in the said church or chapel of St. James's, Brighton, aforesaid, on divers occasions (to wit, on Sunday, February the 7th, 1869; on Ash Wednesday, February the 10th, 1869; on Sunday, February the 28th, 1869; on Sunday, March the 14th, 1869; on Sunday, March the 21st, 1869; on Easter Sunday, March the 28th, 1869), during the prayer of consecration in the order of the administration of the holy communion, elevates the paten or one of the wafers on the communion table for the holy communion above your head, and permitted and sanctioned such elevation by the other officiating ministers, and took into your hands the cup and elevated it above your head during the prayer of consecration aforesaid, and permitted and sanctioned the cup to be so taken and elevated, as aforesaid, by the other officiating ministers, and that you also, during such prayer of consecration, knelt or prostrated yourself, and sanctioned such kneeling or prostrating by the other officiating ministers.

XXIII. That you, the said Rev. John Purchas, in the said church or chapel of St. James's, Brighton, aforesaid, on Whit Sunday morning, May the 16th, 1869, during the communion service, as officiating minister, after receiving the alms contributed at the offertory, elevated the same, and then, placing the same for a moment on the holy table, did forthwith remove the same and hand them to an acolyte or attendant, who took them away and placed them on the credence table, instead of suffering the same to remain on the holy table.

The next article seems to me to contain charges undistinguishable in principle from the practices which are condemned in those judgments, and in that which I have just delivered in the case of Mr. Wix. (1) It was duly proved, and is as follows:—

XI. That you, the said Rev. John Purchas, on Christmas Day, 1868, on the day of the purification of the Virgin Mary, February the 2nd, 1869, and on Easter Sunday, 1869, used lighted candles standing on and about and before the communion table during the performance of other parts of the morning service than the communion service, as a matter of ceremony, and when they were not wanted for the purpose of giving light. That you also during the whole of divine service on Easter Sunday, 1869, kept a very large lighted candle, called a paschal taper, placed and standing towards the south side of the communion table, as a matter of ceremony, and when it was not wanted for the purpose of giving light. That you also, at various times, during the performance of Divine service (to wit, on Sunday morning, November the 1st, 1868; Sunday morning, March the 21st, 1869, and Whit Sunday, May the 16th, 1869), caused acolytes, or attendants, as a matter of ceremony, to bear about, move, set down, and lift up various lighted candles when the same were not needed to give light.

(1) Ante, p. 58.

I admonish Mr. Purchas to abstain for the future from doing or sanctioning the acts so charged in these seven articles.

I have now to consider the charge of administering at the holy eucharist wine with which a little water has been mingled. The article containing this charge is as follows:—

XVI. That you, the said Rev. John Purchas, in the said church or chapel of St. James's, Brighton, aforesaid, on Whit Sunday, May the 16th, 1869, administered wine mixed with water instead of wine to the communicants at the Lord's Supper.

I had occasion to consider this subject in my judgment in *Martin* v. *Mackonochie* (1), and I then observed:—

It appears that from a very early period, the precise date is uncertain, a custom prevailed amongst Christians of adding a very small quantity of water to the wine which forms one element of the blessed sacrament. This custom, whether it arose from a belief that the wine used by the Jews at the Passover, and by our Lord at the Last Supper, was mingled with water, or from some reason symbolical of his passion, is wholly unconnected with any papal superstition, or any doctrine which the Church of England has rejected. It has the warrant of primitive antiquity and of the undivided church in its favour.

To the authorities there cited I would add this from Dr. Smith's "Dictionary of the Bible," title "Wine" (vol. iii. p. 1778): "The wine was mixed with warm water on these occasions," referring to the Passover, "as implied in the notice of the warming kettle." (Pesach. 7, § 13.) "Hence in the early Christian church it was usual to mix the sacramental wine with water, a custom as old, at all events, as Justin Martyr's time (Apol. i. 65)." I also referred to the rubric in the first prayer-book, and the omission of the order "putting thereto a little pure and clear water" in the later prayer-books; and I decided that "the ceremony or manual act of mixing the water with the wine during the celebration of the eucharist" was illegal.

At the same time I added, "I do not say that it is illegal to administer to the communicants wine in which a little water has been previously mixed." At that time I had in my mind, among other authorities, that of Bishop Andrewes, who appears to have used the mixed chalice in the Chapel Royal all the time he was dean of it, and who in the form that he drew up for the consecration of a church expressly directed it to be used (Wheatly, "Common Prayer," p. 281); and that of Bishop Cosin, who, speaking of the practice

(1) Law Rep. 2 A. & E. at p. 216.

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under the Elizabethan prayer-books, says, "Our church forbids it not, for aught I know, and they that think fit may use it, as some most eminent among us do at this day." ("Notes on the Book of Common Prayer," 1st series, p. 154, Works, vol. v.)

The subject is treated of with much learning by Mr. Palmer in his "Origines Liturgicæ"; he says (1):—

> In the Church of England the wine of the eucharist was always, no doubt, mixed with water. In the canons of the Anglo-Saxon church, published in the time of King Edgar, it is enjoined that "no priest shall celebrate the liturgy unless he have all things which pertain to the holy eucharist, that is, a pure oblation, pure wine, and pure water." In after ages we find no canons made to enforce the use of water, for it was an established custom. Certainly none can be more canonical, and more conformable to the practice of the primitive church. In the English church it has never been forbidden or prohibited, for the rubric which enjoins the priest to place bread and wine on the table, does not prohibit him from mingling water with that wine.

In this opinion, provided that the mingling be not made at the time of the celebration so as to constitute a new rite or ceremony, I agree. I therefore pronounce that Mr. Purchas has not been guilty of a canonical offence in this matter.

The 20th Article charges as follows:—

> XX. That you, the said Rev. John Purchas, in the said church or chapel of St. James's, Brighton, aforesaid, on divers occasions (to wit, on Sunday, January the 1st, 1869; Sunday, February the 7th, 1869; Monday, March 15th, 1869; on Sunday, March 21st, 1869; on Easter Sunday, March the 28th, 1869; and Whit Sunday, May the 16th, 1869), in the administration of the holy communion, used wafer bread (being bread made in the special shape and fashion of circular wafers) instead of bread such as is usual to be eaten, and did administer the same to the communicants, that is to say, one such wafer to each of them.

My first observation upon this article is, that it is not proved as laid; the witness Verral deposed that the bread was in the form of a thin wafer, that he saw it administered to the communicants, but was not sufficiently close to know that what was administered was not a portion of each wafer. The present rubric directs that the priest is to break the bread during the course of the prayer of consecration. There is no evidence before me that the wafer was not broken; and the only question I have to consider is, whether wafer bread, that is, bread in the shape of a wafer, may lawfully be administered.

The rubric which governs this question is as follows:—"And to

(1) Vol. ii. p. 76.

take away all occasion of dissension and superstition which any person hath or might have concerning the bread and wine, it shall suffice that the bread be such as is usual to be eaten; but the best and purest wheat bread that may conveniently be gotten." This rubric varies from that of the second prayer-book of Edward VI. only by the substitution of the words, "all occasion of dissension and superstition" for "the superstition."

Previously to these rubrics unleavened bread was used in our church, and this custom was continued by the first prayer-book of Edward VI., the rubric to which was as follows:—

For avoiding of all matters and occasion of dissension, it is meet that the bread prepared for the communion be made, through all this realm, after one sort and fashion, that is to say, unleavened and round, as it was afore, but without all manner of print, and something more larger and thicker than it was, so that it may be aptly divided in divers pieces; and every one shall be divided in two pieces at the least, or more, by the discretion of the minister, and so distributed. And men must not think less to be received in part than in the whole, but in each of them the whole body of our Saviour Jesus Christ.

It appears, therefore, that while the first rubric prescribed a uniformity of size and material, the later and the present rubric are contented with the order that the purest wheaten flour shall suffice, and the bread may be leavened according to the use of the Eastern, or unleavened according to the use of the Western, church. The Elizabethan rubric, which is practically the same as the present, received this "contemporanea expositio" from that Queen's Injunctions (A.D. 1559), which were as follows (1): Item—

Where also it was in the time of King Edward the Sixth used to have the sacramental bread of common fine bread, it is ordered for the more reverence to be given to the holy mysteries, being the sacraments of the body and blood of our Saviour Jesus Christ, that the same sacramental bread be made and formed plain, without any figure thereupon, of the same finenesse and fashion round, though somewhat bigger in compasse and thicknesse, as the usuall bread and wafer' (variously printed water), "heretofore named singing-cakes, which served for the use of the private masse.

And, in 1570, Archbishop Parker wrote as follows to Sir W. Cecil (2):—

SIR, January 8, 1570.

Where upon the return of my Lord of London from the court, we had communication of the communion bread, and he seeming to signify to me that

(1) Annotated Book of Common Prayer, p. 198.

(2) Correspondence of Archbishop Parker, No. 283, p. 375.

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your honour did not know of any rule passed by law in the communion book that it may be such bread as is usually eaten at the table with other meats, &c.; I thought it good to put you in remembrance, and to move your consideration in the same. For it is a matter of much contention in the realm; where most part of Protestants think it most meet to be in wafer-bread, as the injunction prescribeth; divers others, I cannot tell of what spirit, would have the loaf-bread, &c. And hereupon, one time at a sessions would one Master Fogg have indicted a priest for using wafer-bread, and me indirectly for charging the wafer-bread by injunction; where the judges were Mr. Southcoots and Mr. Gerrard, who were greatly astonied upon the exhibiting of the book. And I being then in the country, they counselled with me, and I made reasons to have the injunction prevail.

First, I said, as her highness talked with me once or twice on that point, and signified that there was one proviso in the Act of the Uniformity of Common Prayer, that by law is granted unto her, that if there be any contempt or irreverence used in the ceremonies or rites of the church, by the misusing of the orders appointed in the book, the Queen's Majesty may, by the advice of her commissioners, or metropolitan, ordain and publish such further ceremonies, or rites, as may be most for the reverence of Christ's holy mysteries and sacraments, and but for which law her highness would not have agreed to divers orders of the book; and by virtue of which law she published further order in her injunctions both for the communion bread, and for the placing of the tables within the quire. They that like not the injunctions force much the statute in the book. I tell them that they do evil to make odious comparison betwixt statute and injunction, and yet I say and hold, that the injunction hath authority by proviso of the statute. And whereas it is said in the rule, that "to take away the superstition which any person hath, or might have, in the bread and wine, it shall suffice that the bread be such as is usually to be eaten at the table with other meats, &c." "It shall suffice," I expound, where either there wanteth such fine usual bread, or superstition be feared in the wafer-bread, they may have the communion in fine usual bread; which is rather a toleration in these two necessities, than is in plain ordering, as is in the injunction.

This I say to shew you the ground which hath moved me and others to have it in the wafer-bread; a matter not greatly material, but only obeying the Queen's Highness, and for that the most part of her subjects disliketh the common bread for the sacrament. And therefore, as her highness and you shall determine, I can soon alter my order, although now quietly received in my diocese, and I think would breed some variance to alter it. I hear also that in the court you be come to the usual bread. Sir, the great disquiet babbling that the realm is in in this matter maketh me thus long to babble, and would be loth that now your saying or judgment should be so taken as ye saw a law that should prejudice the injunction.

This is an authority which must command great respect in this court, and from which I see no reason to dissent, more especially as it proceeds upon a principle of construction similar to that to which I have already adverted as having been adopted in *Westerton* v. *Liddell* (1), with respect to the covering of the holy table. I should

(1) Moore's Special Report.

add that, according to Bishop Cosin, this "liberty of using wafer-bread was continued in divers churches of the kingdom—and in Westminster for one—till the 17th of King Charles," i.e. A.D. 1643. —(Works, vol. v. p. 481). I am of opinion that no offence against ecclesiastical law has been proved to have been committed by Mr. Purchas in this matter.

The 6th and 7th Articles contain the following charges:—

VI. That you, the said Rev. John Purchas, on the several occasions hereinafter in this article mentioned, in the said church or chapel of St. James's, Brighton, aforesaid (to wit, on Sunday, November the 1st, 1868; on Sunday, November the 8th, 1868; Sunday, January the 31st, 1869), placed or caused to be placed on the holy table, or on a narrow ledge resting thereon or connected therewith, or fixed immediately above the same so as to appear to the congregation to be in contact or connection with the holy table, a large metal crucifix with a figure of the Saviour thereon (the same being intended for a ceremonial or religious purpose, *and not being a part of the architectural decorations of the church*, but being placed on such ledge with the object and intention of being made to appear a part of the furniture of the holy table); and that you, on the said several occasions, allowed the same so placed to remain there during the performance of Divine service, and during the celebration of the holy communion. That you, the said Rev. John Purchas, also, during Lent (to wit, on Sunday, February the 28th, 1869; on Sunday, March the 14th, 1869; and on Good Friday, March the 26th, 1869), having covered, or caused to be covered, the said crucifix so placed on the holy table or narrow ledge as aforesaid, with a white veil striped with a red cross, allowed the same to remain on the said holy table or narrow ledge so covered during the performance of Divine service. That you also afterwards (to wit, on Easter Sunday, March the 28th, 1869), having previously removed, or caused to be removed, such veil, kept the said crucifix during Divine service so uncovered; the circumstance of the said crucifix being so kept covered and uncovered, being intended as and constituting on each of the said occasions a ceremonial and symbolical observance during and connected with such Divine service.

VII. That you, the said Rev. John Purchas, in the said church or chapel of St. James's, Brighton, aforesaid, on the following occasions (to wit, on Sunday, November the 8th, 1868; January the 17th, 1869; and Whit Sunday, May the 16th, 1869), did immediately before and during the performance of Divine service bow and do reverence to the said crucifix.

I think I am bound to conclude from the evidence before me, unimpeached as it is by any other testimony, and in the absence of any explanation, that the crucifix has been introduced into or connected with the performance of the services prescribed by the prayer-book, so as to constitute an additional rite or ceremony. And I must admonish Mr. Purchas to abstrain from the practice complained of in these articles.

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The next charge in order is the

IXth. That you, the said Rev. John Purchas, in the said church or chapel of St. James's, Brighton, aforesaid, on divers occasions (to wit, on Sunday, November the 1st, 1868; Sunday, November the 8th, 1868; on the day of the Purification of the Virgin Mary, February the 2nd, 1869; on Sunday, February the 7th, 1869; and on Whit Sunday, May the 16th, 1869), caused vases of flowers to be placed on the holy table, or on a narrow ledge resting thereon, or fixed immediately above the same, so as to appear, and with the object and intention of being made to appear, to the congregation to be in contact or connection with the holy table, and allowed them to remain so placed on each of the said occasions during the performance of Divine service. That you also, during Lent, 1869, caused the said vases of flowers to be removed and taken away; and again afterwards, more especially on Easter Sunday, March the 28th, 1869, and on Whit Sunday, May the 16th, 1869, replaced, or caused to be replaced, the said vases with the same or other flowers; and that you also profusely decorated, or caused to be profusely decorated, the said holy table with flowers, the circumstance of such vases and flowers being so placed and kept on the holy table, or removed therefrom, being intended by you as and constituting a ceremonial and symbolical observance.

With regard to this charge, there is no evidence that the flowers were used as an additional rite or ceremony, or as an ornament in the sense affixed to that word in the judgment of the Privy Council in *Liddell* v. *Westerton*. (1) They appear to me an innocent and not unseemly decoration, and one not ministering or subsidiary to any usage or doctrine which the Church has rejected or abrogated, and to be in the same category with the branches of holly at Christmas, and the willow blossoms on Palm Sunday, with which our churches have very generally been adorned. I have considered the Bishop of Exeter's judgment on this point, to which I was referred, of which I think it is enough to say that it was given nearly ten years before the decision in *Liddell* v. *Westerton* had settled the law, and drawn the distinction between ornaments (ornamenta) and decorations.

And here I must draw attention to the language of the Privy Council in *Martin* v. *Mackonochie* (2):—

There is a clear and obvious distinction between the presence in the church of things inert and unused, and the active use of the same things as a part of the administration of a sacrament or of a ceremony. Incense, water, a banner, a torch, a candle and candlestick may be parts of the furniture or ornaments of a church; but the censing of persons and things, or, as was said by the Dean of Arches, the bringing in incense at the beginning or during the celebration, and removing it at the close of the celebration of the eucharist; the symbolical use of

(1) Moore's Special Report. (2) Law Rep. 2 P. C. at p. 387.

water in baptism, or its ceremonial mixing with the sacramental wine; the waving or carrying the banner; the lighting, cremation, and symbolical use of the torch or candle: these acts give a life and meaning to what is otherwise inexpressive, and the act must be justified, if at all, as part of a ceremonial law.

I do not pronounce that Mr. Purchas has been guilty of an ecclesiastical offence in this matter.

The 29th Article charges as follows:—

That you, the said Rev. John Purchas, in the said church or chapel of St. James's, Brighton, aforesaid, on the occasion of a celebration of the holy communion at midnight on Christmas Eve, December the 24th, 1868, placed or caused to be placed, on a shelf just above the credence table in the said church a modelled figure of the infant Saviour, with two lilies on either side, the same being so then placed as a part of the ceremonial of the service of that night, and which was subsequently removed; and that on Whit Sunday, May the 16th, 1869, you placed, or caused to be placed, in the said church or chapel, above and hanging over the holy table, a figure, image, or stuffed skin of a dove in a flying attitude, and kept the same so placed during Divine service, the same being so then placed and kept as a part of the ceremonial of the service.

I think the result of the evidence is that these figures, having regard to the time and the services during which they were brought in and removed, being also emblematic in their character, were ceremonially used upon the occasions referred to, and that, according to the judgment in *Martin* v. *Mackonochie*, they were therefore illegal. It is very possible, however, that these things, perfectly innocent in themselves, were in fact not so used as to fall under the prohibition which attaches to the introduction of new ceremonies; and that, if an explanation had been offered, or other evidence adduced by the defendant, I might have arrived at the conclusion that the things in question belonged merely to the category of what the Privy Council have termed "inert" decorations, and were not actively used in the service; in which case, as at present advised, I should not have pronounced them illegal.

The 24th Article charges as follows:—

That you, the said Rev. John Purchas, in the said church or chapel of St. James's, Brighton, aforesaid, on Good Friday, 1869, when there was no administration of the holy communion, caused or permitted the holy table to be and remain during divine service without any decent covering, such as is enjoined and required by the 82nd Canon of the church.

The leaving of the holy table wholly bare and uncovered during Divine service is, I believe, a practice without warrant from primitive use or custom; but it is certainly contrary to the 82nd Canon, which governs this question, and is therefore illegal.

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The 25th Article charges as follows:—

That you, the said Rev. John Purchas, in the said church or chapel of St. James's, Brighton, aforesaid, on Sunday, December the 27th, 1868; on Palm Sunday, 1869; and on Whit Sunday, May the 16th, 1869, caused holy water, or water previously blessed or consecrated, to be poured into divers receptacles for the same in and about the said church, in order that the same might be used by persons of the congregation before and during the time of Divine service, by way of ceremonial application thereof; and yourself used the same, or caused or permitted the same to be used by others.

There is no evidence to sustain the averments that Mr. Purchas caused holy water or water previously blessed or consecrated to be poured into divers receptacles in and about the church, or that he blessed or consecrated any water, or that he used it himself, or that he caused it to be used by others; there is evidence that there was water in the church, and that some of the congregation crossed themselves with it. I am of opinion that the criminal charges laid against Mr. Purchas in this article are not proved.

The 31st, 32nd, and part of the 19th Articles charge as follows:—

XXXI. That you, the said Rev. John Purchas, in the said church or chapel of St. James's, Brighton, aforesaid, on divers occasions (to wit, during Divine service, on the mornings of Sunday, January the 17th, 1869, and Sunday, January the 31st, 1869, on the morning of the Feast of the Purification of the Virgin Mary, February the 2nd, 1869, and on the morning of Sunday, February the 7th, 1869, and on Whit Sunday, May the 16th, 1869), during the saying of the Apostles' creed and Nicene creed, and at the pronouncing of the absolution in the order for the holy communion, and at the giving of the elements to the communicants, and on certain other occasions (to wit, during Divine service, on Sunday evening, the 7th of February, 1867 (sic), and Whit Sunday evening, May the 16th, 1869), during the pronouncing of the benediction, after the sermon, and on certain other occasions (to wit, during the communion service on Ash Wednesday, February the 10th, 1869, and on Sunday, February the 28th, 1869), when about to mix water with the wine, and when about to consecrate the same, you, being then the officiating minister, made the sign of the cross by the appropriate gesture for that purpose, the same being intended as and constituting a ceremony.

XXXII. That you, the said Rev. John Purchas, in the said church or chapel of St. James's, Brighton, aforesaid, you being present, and responsible for the due performance of Divine service therein, on Sunday morning, January the 31st, 1869, during the communion service, directed, caused, or permitted and sanctioned, a certain clergyman then assisting you in the performance of Divine service by reading the gospel for the day, to kiss the book from which he read the gospel, such kissing of the book being intended as and constituting a matter of ceremony, the said book, during such reading of the gospel, being, in a ceremonial manner, held before him by a deacon or attendant.

XIX. That you, the said Rev. John Purchas, on a certain occasion (to wit, on Sunday morning, January the 31st, 1869), in the said church or chapel of St. James's, Brighton, aforesaid, while reading the prayer for the "whole state of Christ's church militant here on earth," stood, with your back to the people, in front of the middle of the holy table, and while reading the word "oblations," as a religious ceremony took up the chalice, then being on the said holy table, and elevated it above your head.

The ruling of the Privy Council in the case of *Martin* v. *Mackonochie*, with respect to the kneeling of the priest during the communion service, seems to me to apply to the acts of devotion complained of in these articles, which I must therefore pronounce illegal.

The latter part of Article 17—I have already referred to the charges contained in the former part—charges as follows:—

And that you also, during the whole of such prayer of consecration, stood at the middle of that side of the holy table which, if the said holy table stood at the east end of the said church or chapel (the said table in St. James's chapel, in fact, standing at the west end thereof), would be the west side of such table, in such wise that you then stood between the people and the said holy table, with your back to the people, so that the people could not see you break the bread or take the cup into your hand.

I must observe that the rubric does not require that the people should see the breaking of the bread or the taking of the cup into the priest's hands; and, if it did so prescribe, the evidence in this case would establish that all the congregation could see him take the cup into his hands, and some of them, at least, could see him break the bread. But, in truth, the question appears to me to have been settled by the Privy Council in the case of *Martin* v. *Mackonochie*. (1)

The rubric before the prayer of consecration then follows, and is in these words:—

"When the priest, standing before the table, hath so ordered the bread and wine that he may with the more readiness and decency break the bread before the people, and take the cup into his hands, he shall say the prayer of consecration, as follows."

Their lordships entertain no doubt on the construction of this rubric that the priest is intended to continue in one posture during the prayer, and not to change from standing to kneeling, or vice versâ; and it appears to them equally certain that the priest is intended to stand and not to kneel. They think that the words "standing before the table" apply to the whole sentence; and they think that

(1) Law Rep. 2 P. C. at p. 382.

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this is made more apparent by the consideration that acts are to be done by the priest before the people, as the prayer proceeds (such as taking the paten and chalice into his hands, breaking the bread, and laying his hand on the various vessels), which could only be done in the attitude of standing.

I dismiss this charge against Mr. Purchas.

The 18th Article charges as follows:—

That you, the said Rev. John Purchas, on a certain occasion (to wit, on Sunday morning, November the 1st, 1868), directed, sanctioned, or permitted a certain other clergyman, then officiating for you, in the presence of you, the said Rev. John Purchas, to read the collects next before the epistle for the day in the communion service, standing in front of the middle of the holy table, with his back to the people; and that on a certain other occasion (to wit, Sunday morning, January the 17th, 1869), you, the said Rev. John Purchas, read such collects yourself, standing with your back to the people.

As to this charge the proof is that both Mr. Purchas and the assistant clergyman on the several occasions stood before the holy table with their backs to the people. It is not proved that the assistant clergyman, on the occasion mentioned, stood before the people. The rubric which governs the position of the minister at this period of the service is the one preceding the Lord's Prayer at the beginning of the communion service:—"And the priest, standing at the north side of the table, shall say the Lord's Prayer, with the collect following, the people kneeling;" and, after the interval of the Ten Commandments, the rubric enjoins the priest "to stand as before." I am aware that learned persons hold that these words, "the north side," mean "the north side of the table's front," and possibly they do so; but, in the absence of any argument before me to this effect, I think I must take the primâ facie meaning of the rubric, and consider it as the north side of the whole table; and upon this ground I must decide against Mr. Purchas upon this article.

Two charges are contained in that part of the 19th Article to which I have not as yet referred:—

(*a.*) And that on a certain other occasion (to wit, on Sunday evening, January the 31st, 1869), you, the said Rev. John Purchas, did, in the said church or chapel, during the performance of Divine service, and while reading the collects following the creed, stand in front of the middle of the holy table at the foot of the steps leading up to the same, with your back to the people:

(*b.*) And that on a certain other occasion, during the performance of Divine service in the said church or chapel (to wit, on Sunday morning, February the 7th, 1869), you, the said Rev. John Purchas, directed, sanctioned, or permitted

the epistle in the communion service to be read in your presence by a minister standing with his back to the people.

The first offence appears to me plainly contrary to the rubric; and the second, though, perhaps, not governed by any positive order in a rubric, is obviously contrary to the intent of the prayer-book, the epistle not being a prayer addressed to God, but a portion of the Scripture read to the people.

The 30th Article charges as follows:—

That you, the said Rev. John Purchas, in the said church or chapel of St. James's, Brighton, aforesaid, on Sunday morning, November the 1st, 1868, publicly during the performance of Divine service, that is to say, at the conclusion of the Nicene creed, gave notice that on the morning of the next day there would be "a high celebration of the holy eucharist" at eleven o'clock; and that you, on the same day, after the sermon, gave, or caused to be given, notice that on the next Friday, "being the feast of St. Leonard," there would be a celebration of the holy eucharist at eleven o'clock; and that on Sunday, November the 8th, 1868, after the Nicene creed, you gave notice that the holy eucharist would be celebrated on Wednesday, "being the Feast of St. Martin;" and on Friday, "being the Feast of St. Britius." And that on Sunday morning, January the 31st, 1869, after the Nicene creed, you gave notice that "on Tuesday next, being the Festival of our Lady, there would be a high celebration of the holy eucharist at eleven o'clock in the morning."

The prayer-book does not warrant, in my opinion, this particular mode of announcing that the eucharist will be celebrated. According to the rubric, after the Nicene creed notice is then to be given of the communion, and according to the rubric after the church militant prayer, "When the minister giveth warning for the celebration of the holy communion . . . after the sermon or homily ended he shall read this exhortation following." It appears to me that the epithet "high" has no sanction from the rubric, and, though perhaps in itself not very material, cannot legally be used. It appears from the evidence that at different times notices were given that the feasts of St. Leonard, St. Martin, and St. Britius would be observed. The rubric, after the Nicene creed, directs that "the curate shall declare unto the people what holy-days or fasting days are in the week following to be observed." Mr. Purchas is not charged with having violated the law by omitting to give notice of these holy-days or fasting days, but by having given notice of holy-days which the church has not directed to be observed. I think the holy-days which are directed to be observed are those which are to be found after the preface of the prayer-

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book, under the head of "A Table of all the Feasts that are to be observed in the Church of England throughout the year." The feasts of St. Leonard, St. Martin, and St. Britius are not among these; I therefore think the notices of them were improper, and I must admonish Mr. Purchas to abstain from giving such notices for the future.

This is my judgment upon the particular charges brought against the defendant; but I cannot conclude it without once again referring to the general question to which these charges relate. In the judgment in *Martin* v. *Mackonochie* (1), I said:—

> Before I proceed to consider the greater question, whether they are ceremonies forbidden by the ecclesiastical law of England, and more especially by that part of it which consists of the provisions of the prayer-book and the Statute of Uniformity, I think it right to draw attention to the judgment of the Church Universal, and especially of "that pure and apostolical branch of it established in this realm," upon the general subject of ceremonies.
>
> And from that judgment it will, I think, appear that an essential distinction is drawn between those which are, from their origin, immutable, and those which it is competent to the proper authorities to mould according to the varying necessities and exigencies of each particular church.

I then cited various authorities upon this point, and I added (2):—

> I have thought it expedient to recite the foregoing authorities upon the nature of rites and ceremonies, in order to fortify my position, that the questions now pending before me in no way affect the relations of the Church of England to the Church Catholic, but have reference solely to matters of detail and order in her ministrations, which every independent church has at all times claimed and exercised.

I have deemed it well to repeat this language upon the present occasion, because I think that the proposition which it embodies would, if temperately and impartially considered, tend to prevent the litigation and allay the discord which is at the present moment distracting the energies and weakening the authority of our Church.

Now with respect to the question of costs, I shall condemn the defendant in the costs of all those charges which have been substantiated against him; and as the defendant has not appeared, I shall make no order as to the costs of those charges which the promoter has failed to substantiate.

The course which the Registrar will probably think it proper to

(1) Law Rep. 2 A. & E. at p. 136. (2) Law Rep. 2 A. & E. at p. 146.

pursue will be to tax the promoter's whole costs of suit, and subsequently to deduct from that sum such a proportion as he may think fairly represents the cost of the unsubstantiated charges. It will probably be found a case in which a very close estimate cannot be made; and considerable discretion, subject to the revision of the Court, must be left to the Registrar.

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Proctors for promoter: *Moore & Currey.*

[IN THE ARCHES COURT.]

1868 *July* 28.

THE OFFICE OF THE JUDGE PROMOTED BY RITCHINGS *v.* CORDINGLEY.

Churchwardens—Vestry Meeting—Removal of Ornaments placed irregularly in a Parish Church—Custody of the Key of the Parish Church.

A ledge or super-altar was placed on the holy table in a parish church by the order of the incumbent without the consent of the ordinary; after a lapse of many months a vestry meeting was held, at which a resolution was passed that the churchwardens should take steps to remove the super-altar; the morning after the vestry meeting the defendant, one of the churchwardens, sent to the incumbent for the keys of the church; the incumbent refused to give the defendant the keys, but sent word that the defendant could have access to the church that day between eleven o'clock in the forenoon and one o'clock in the afternoon. About one o'clock the defendant went to the church with a workman and found the church door locked; the workman, acting by the orders of the defendant, picked the lock, entered the church in company with the defendant, and pulled down the super-altar:—

Held, that the conduct of the defendant was illegal.

Semble, ornaments which have been illegally or irregularly placed in a parish church by the incumbent cannot be lawfully removed, save under the sanction of the ordinary.

Semble, the powers conferred upon the churchwardens of a parish cannot be exercised by one of the churchwardens without the concurrence of his colleague.

Churchwardens have a right of access to the church at proper seasons, but they are not entitled to the custody of the keys of the church.

July 21 and 22, 1868. *Dr. Deane, Q.C.*, and *Dr. Tristram*, for the promoter.

Stephens, Q.C., and *Dr. Swabey*, for the defendant.

The facts of the case appear from the judgment.

Cur. adv. vult.

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July 28, 1868. SIR ROBERT PHILLIMORE. This is a case which comes before this Court by letters of request from the Chancellor of Worcester. It is a suit instituted in a criminal form by the incumbent of Atherstone, Mr. Ritchings, against one of the churchwardens, Mr. Cordingley. The offences charged against this gentleman are,—entering the church by means of a picklock, contrary to the wish of the incumbent, and causing a ledge of wood, or, as it is called, a super-altar, to be violently removed from the holy table; breaking and throwing away the same, and also for injuring and removing the cloth which covered the holy table; and for removing certain sockets from a pillar on which banners were sometimes placed; and for violent and irreverent conduct on the part of himself and others in the church.

The defence on the part of Mr. Cordingley is that the incumbent refused to allow the keys of the church for the purpose of entering therein, and that the articles in question had been put up illegally without a faculty, and were violently removed by the churchwardens under sanction of the vestry.

The material facts, which have been admitted or proved before me in evidence, are as follows:—It appears that about Christmas, 1865, this ledge was placed on the holy table by Mr. Ritchings, or with his permission, and that it has remained there from that time till it was taken away by Mr. Cordingley. No objection was raised till Easter 1866, and it was there when the bishop held a confirmation in the church in 1867. This addition, however, to the holy table was made without the consent of the ordinary, either informally expressed, or formally through the medium of a faculty. This is much to be lamented, because the alteration, whether legal or not, was of that character which ought to have been submitted to the discretion of the ordinary, in order that he might judge whether the introduction of it was or was not expedient at that time and in the particular circumstances of the parish.

On the 22nd of August, 1867, a vestry meeting was holden, which was adjourned to the town-hall. How it was summoned does not appear, but it was preceded by a printed placard, headed "Ritualism," and, certainly, was not of a character to produce fair, temperate, decent, or quiet discussion. I am not surprised that nobody should have been willing to own that he was in any way

concerned with it. At this vestry a resolution was passed that the churchwardens, that is both of them, should take steps for removing the super-altar.

On the next morning, the 23rd of August, Mr. Cordingley sent to Mr. Ritchings for the keys of the church. Mr. Ritchings sent word to him by Allcock, the other churchwarden, that he, Mr. Ritchings, was going to church at eleven, and that he would wait for him till one o'clock. Mr. Cordingley then said that if the keys were not placed in his hands "he would break open the church door, or make it so that nobody could open it."

Mr. Ritchings went accordingly to the church and stayed till twenty minutes to one, when he wrote to Mr. Cordingley as follows:—

"Atherstone, August 23, 1867.

"Sir,—In future when you want access to the church as churchwarden, I must request you to name the time and to give me the reasonable notice to which I am entitled. The church has been open from eleven o'clock till service time, at twelve, to suit your convenience.

"I repeat that you can, by applying to me, have access to the church at any reasonable hour, but I shall not give up the keys.

"I am,

"Your obedient servant,

"To Mr. Cordingley. "F. H. Ritchings."

To this letter Mr. Ritchings received no answer. As a general rule Mr. Ritchings says he refused to give Mr. Cordingley the keys of the church, but did not refuse him access; on the contrary, he said that upon reasonable notice he might always have it. It appears, however, that on two occasions, one being the 22nd of August, he refused to allow the bells to be rung to give notice of a vestry meeting.

About one o'clock Scanlan, a locksmith in the employment of Wood, arrived by Cordingley's order with a picklock in his hand, and proceeded to pick the lock of the church door. Mr. Husband, the curate, who was present, warned him that the act was illegal; the man hesitated, but under the orders of Cordingley proceeded; the lock was picked, the church was entered. Scanlan, with a hammer and chisel in his hand, entered the communion rails,

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pulled out the nails which fastened the cloth to the holy table, took off the ledge or super-altar—according to Mr. Husband's evidence Cordingley dashed the super-altar with such violence on the floor that it was broken at one end,—and it was then thrown into a place where coals were kept. The sockets were also forcibly removed from the pillars. The cloth of the holy table was taken to an upholsterer by Cordingley, and by him directed to be altered; the other churchwarden afterwards obtained possession of it, and the holy communion table remained uncovered for one or two weeks. While the house of God was the scene of these transactions, other persons, as must have been expected, came into the porch and the body of the church, one man wearing his hat, and alleging that he did so because he was not in a place of Protestant worship; a melancholy and miserable, but natural, example of what men, respectable in private life, will do under the effect of violent religious excitement, when they—to use a common but very expressive phrase—"take the law into their own hands."

The counsel for the defendant exerted himself to the utmost to palliate acts which he must have known to be incapable of vindication. First, it was maintained or suggested that one churchwarden had, under the sanction of the vestry, authority to do these acts, both without the concurrence of his colleague or the authority of his ordinary. As a matter of fact, the vestry did not pretend to authorize one churchwarden to act in this way; as a matter of law they had no power to authorize both to do so. It is not competent to the vestry to alter the law, or to substitute their own will and pleasure for it, or to clothe by any resolution both, still less one churchwarden, with an authority not inherent in his office. In the well-known case of *Palmer* v. *Bishop of Exon* (1), it was decided by the King's Bench that "the ordinary" (not the vestry or the churchwardens) "was to judge what ornaments were proper, and might order them to be defaced."

I will now deal with the argument that one churchwarden can, with or without the sanction of the vestry, act independently of his colleague. With regard to the case of *Shaw* v. *Hislop* (2), it seems to me adverse to the case of the defendant. It establishes the position that where one churchwarden has incurred a debt on

(1) 1 Str. 576. (2) 4 D. & R. 241.

behalf of the parish without the order of his co-churchwarden, he must be considered to have incurred it on his personal liability and not in his corporate or quasi-corporate character.

The case of *Gouldsworth* v. *Knights* (1), which was also cited, only decided that the Act, 59 Geo. 3, c. 12, s. 17, made the churchwardens and overseers a corporation of a peculiar character, and that it was competent for any one of them to authorize a distress for rent in arrear.

4 P D 99

The case of *Fry* v. *Treasure* (2), to which I referred counsel in the course of the argument, is a very strong decision against the position that one churchwarden can act alone and without the consent of his co-churchwarden, even in matters which must be beneficial to the parish. The Judicial Committee of the Privy Council confirmed the judgment of the Court of Arches, and decided in that case that one churchwarden could not sue alone, without the concurrence and joinder of his colleague, in a suit against a parishioner for subtraction of church rate, nor use the name of his co-churchwarden without the consent of the latter; their lordships say (3): "But necessity, it was urged, requires that in the case of the churchwardens each should be deemed to be invested with an implied authority to use the name of the other in suits for the benefit of the parish, or, at all events, in suits for subtraction of church rate, for that otherwise it might be impossible to collect the rate. There is, however, nothing to warrant such an argument;" and again their Lordships say (4): "the course pursued can only be justified on the assumption that in every suit for subtraction of church rate one churchwarden may always use the name of a co-churchwarden, as a co-plaintiff, without any authority from him. For such a proposition there is no warrant either in principle or on authority." So that it must now be considered to be settled law that, where the majority of the vestry have imposed a rate and authorized the churchwardens to collect it for the benefit of the parish, they cannot empower one churchwarden to take legal proceedings without the consent of his colleague. The law provides another remedy, as was suggested by the Privy Council, namely, the removal of the recusant church-

(1) 11 M. & W. 337.
(2) 2 Moo. P. C. (N. S.) 539.
(3) 2 Moo. P. C. (N. S.) at p. 554.
(4) 2 Moo. P. C. (N. S.) at p. 554–5.

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warden; but the law will not allow a principle to be broken down in order to attain an end in itself expedient and desirable.

The application of this doctrine to the circumstances in the present case is obvious and material. Observe the necessary, and indeed the admitted, consequences of the defendant's position. Some ornament or piece of furniture is placed in a church, perhaps, as in this case, connected with the administration of the Blessed Sacrament of the Lord's Supper. One churchwarden is offended by it, either as a matter of religious feeling or of mere taste; and without consulting or directly contravening the wish of his brother churchwarden, he proceeds by force to enter the church, by force to remove the ornament; the next day the other churchwarden, to whose religious feelings or taste the ornament is agreeable, proceeds by force to restore the ornament; the next day it is again removed, the day after again replaced in the same manner. Or perhaps the two churchwardens meet each other at the head of an army of followers, one with a picklock and a placard, as in this case, "Protestantism and no Ritualism;" and the other with a crowbar, as in the case of *Dewdney* v. *Good* (1), and a banner with "The Catholic Faith." Could the worst enemy of the Church of England, Popish or Protestant, desire her to be placed in a more humiliating position? Would there be any end to the irreligious scoffs, gibes, and jests which such scenes would produce? Could the Church of Rome devise better assistance to her hourly increasing aggressions against the Church of England? Could the enemy of the Establishment, who desires to sever the connection of the Church with the State—the subject upon which men's minds are now so agitated—be more gratified than by such a result of discord and scandal.

I am happy to know that the law of our church neither permits such scandalous proceedings, nor is impotent to punish those who are the authors of them. Independently of the ecclesiastical law, I am much inclined to think that this was a case of "brawling and riotous conduct in a church," which founded the jurisdiction of the magistrates under the recent and valuable statute, 23 & 24 Vict. c. 32, s. 2. It is true that one churchwarden only acted in this case, but I consider it expedient, for the peace of parishes in these times of excited religious feeling, that no doubt should exist as to

(1) 7 Jur. (N. S.) 637.

the limits within which the authority of the churchwarden is to be exercised.

They are the officers of the ordinary and the parish, and the first principle is that their authority, even in matters within their especial cognizance, must be exercised under the control of the ordinary. Take, for instance, the arrangements of sittings in the nave of the church. The general disposal of seats in the nave, and to a certain extent in the chancel, appertains to the churchwardens, though, perhaps, even this doctrine must receive some limitation where the seats are all moveable, or where chairs alone are in use; but as Sir W. Wynne, one of my most distinguished predecessors in this chair, observed, "this is for convenience, and for the preservation of peace and quiet. But this right is not to be used arbitrarily, not without considering whether there be any legal or equitable right. If the churchwardens interfere to take away a seat, and, à fortiori, to take it to themselves, the ordinary will interfere . . . : *Drury* v. *Harrison*. (1) So, in *Parham* v. *Templar* (2), decided by Sir John Nicholl, the churchwardens are spoken of as "acting under the ordinary." (3) And, in the same case, it is said: "The churchwardens may remove persons originally placed in seats, or their descendants; but if they do so capriciously, or without just ground, the ordinary will control and correct them." (3)

Upon the general question of the duties and powers of churchwardens it would be impossible to find a better statement, or one coming from a higher authority, than that which is laid down by Lord Stowell in the following judgment in *Hutchins* v. *Denziloe* (4): —"The first point is, whether these churchwardens have a right to interfere in the service of the church? as, if that interference is legal in any case, it is so in the present. To ascertain this, it is proper to consider what are their duties, and I conceive that originally they were confined to the care of the ecclesiastical property of the parish, over which they exercised a discretionary power for specific purposes. In all other respects it is an office of observation and complaint, but not of control, with respect to divine worship; so it is laid down in Ayliffe, in one of the best dissertations on the duties

(1) 3 Phillim. 515, n.
(2) 3 Phillim. 515.
(3) 3 Phillim. at p. 523.
(4) 1 Hagg. Const. at p. 173.

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of churchwardens, and in the canons of 1571. In these it is observed that churchwardens are appointed to provide the furniture of the church, the bread and wine for the holy sacrament, the surplice, and the books necessary for the performance of divine worship, and such as are directed by law, but it is the minister who has the *use*. If, indeed, he errs in this respect, it is just matter of complaint, which the churchwardens are obliged to attend to; but the law would not oblige them to complain if they had a power in themselves to redress the abuse. In the service, the churchwardens have nothing to do but to collect the alms at the offertory, and they may refuse the admission of strange preachers into the pulpit. For this purpose they are authorized by the canon, but *how?* When letters of orders are produced their authority ceases. Again, if the minister introduces any irregularity into the service, they have no authority to interfere, but they may complain to the ordinary of his conduct. I do not say there may not be cases where they may be bound to interpose; in such cases they may repress, and ought to repress, all indecent interruptions of the service by others, and are the most proper persons to repress them, and they desert their duty if they do not. And if a case could be imagined in which even a preacher himself was guilty of any act grossly offensive, either from natural infirmity or from disorderly habits, I will not say that the churchwardens, and even private persons, might not interpose to preserve the decorum of public worship. But that is a case of instant and overbearing necessity that supersedes all ordinary rules. In cases which fall short of such a singular pressure, and can await the remedy of a proper legal complaint, that is the only proper mode to be pursued by a churchwarden."

I have carefully considered the chapter in Ayliffe referred to by Lord Stowell, and I find it entirely in accordance with his view. I was also referred by Mr. Stephens to a judgment delivered by myself in the Consistory of Oxford, reported at length by Dr. Swabey in the "Law Times," *The Churchwarden of Ensham* v. *The Vicar of Ensham* (1), as containing a correct exposition of the law upon this subject. I am not aware that it in any way conflicts with the principles of the judgment which I am about to deliver.

(1) 29 L. T. 402.

Indeed the whole doctrine of presentments by the churchwardens is founded upon the fact that this office is one of "observation and complaint," and, except in extraordinary emergencies, not one of immediate action or exercise of individual power. There would be no necessity for presentment to the ordinary at all, if the churchwardens might take the law into their own hands, and remove, without reference to him, whatever they conceived to be illegal in the ornaments of the church.

In the Knightsbridge cases, *Westerton* v. *Liddell* and *Beal* v. *Liddell* (1), the proper course was adopted; the power of the ordinary was invoked to remove illegal ornaments; and the result proved the wisdom of this proceeding; for the churchwarden would in that case have removed many ornaments which the Judicial Committee eventually pronounced to be legal.

In the present case the churchwarden removed altogether the ledge which was upon the holy table. Now, the decision of the judicial committee of the Privy Council in *Liddell* v. *Beal* (2) established that the addition of a wooden ledge to the holy table, called in that as in this case a super-altar, which is not fastened to the table so as to be immoveable, is a legal ornament; their lordships say that when the Lord's Supper is administered the ledge might be removed and replaced upon the table "for the purpose of holding candlesticks and vessels;" and it is said in that judgment, "it is not shewn, and their lordships think it ought not to be inferred, that there is anything superstitious (if the term may be used) or anything improper in the addition of that ledge." Much has been said in this case upon the point as to whether or not the ledge was attached to the holy table so as to be immoveable; it certainly was not fastened to the holy table itself, but there is a doubt upon the evidence whether it was not so attached to the cloth as to necessitate the removal of the cloth when the ledge was removed. I am not prepared to say that even in this case it would not fall within the principle of permission in *Liddell* v. *Beal*. (2) But assuming this not to be so, observe the error of the churchwarden's conduct; he evidently thought that the addition of the ledge was, per se, illegal; he did not unfasten it from the cloth and replace it as the law (if he had any power at all in

(1) Moore's Special Report. (2) 14 Moo. P. C. 1.

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the matter) could have required him to have done, but he caused it to be detached from the cloth and removed altogether, and put away in a coal-hole. I may remark here that my surprise, that any churchwarden should have dealt so irreverently with what had been for some years connected with the holy table, was diminished by the subsequent evidence in the case. From that evidence it appeared that when Mr. Cordingley was first chosen churchwarden he honestly and expressly stated that he was not a member of any church, which he explained in this Court to mean that he had never been a communicant. It was certainly a strange and ill-advised choice by the parishioners in the first instance, and I think it reflects credit upon Mr. Cordingley that he was aware of the impropriety of his occupying this position, and with reluctance he accepted it contrary to his wishes. He said in this Court, "I have never communicated, and I have always had a great reluctance to be churchwarden."

It cannot be too plainly stated that, without reference to extreme and exceptional cases, which afford no test of the law, ornaments which have once been de facto, though illegally or irregularly, placed in the church, must be legally, that is, under the sanction of the ordinary, removed. This is a position no less sound in law than essential for the peace of parishes. Lord Stowell applied this principle to the matter of removing monuments in churches. "It is alleged," he says, "that the rector had given his consent that the monument should be taken down, which, however, is denied. But the taking down of the monument would be an offence for which also the party would be liable to prosecution; since, when once erected, it cannot be removed without the sanction of the Ordinary. The consent of the rector, therefore, would not be sufficient:" *Maidman* v. *Malpas.* (1)

Lastly, it has been urged in mitigation of the conduct of the churchwarden that he had a right, not merely of access to the church at proper seasons, but to the custody of the keys of the church. *Jarratt* v. *Steele* (2) was relied upon for this position. In that case Sir John Nicholl observed: "All persons ought to understand that the sacred edifice of the church is under the protection of the ecclesiastical laws as they are administered in these

(1) 1 Hagg. Const. at p. 212. (2) 3 Phillim. 167, 169.

Courts; that the possession of the church is in the minister and the churchwardens; and that no person has a right to enter it when it is not open for divine service, except with their permission and under their authority." Lord Chief Justice Erle's judgment, too, in *Griffin* v. *Dighton* (1), was much relied upon, in which he recites this passage as the foundation of his own judgment, adding: "That is a perfectly sound exposition of the law in the temporal as well as in the ecclesiastical courts. The domus mansionalis Omnipotentis Dei is not to be turned from the purpose which that name expresses, and the minister and churchwardens are entitled to possession of the church, and to have free access to it at all times." It has been endeavoured to extract from this language of Sir John Nicholl in *Jarratt* v. *Steele* (2), the position that the freehold of the church is in the churchwardens as well as in the incumbent, or, at least, that the custody of the church is equally vested in both parties, and therefore that the churchwardens must be entitled to the keys of the church equally with the incumbent. But this is a position which even the letter of the judgment does not warrant, and which is directly at variance with the common law and a series of decisions upon the subject, and most especially with the decision of the same learned judge in the later and very carefully considered case of *Lee* v. *Mathews*. (3) Observe his language in this case: "On the other hand," he says, "the minister kept possession of the keys of the church; and, as it should seem, in order to prevent this painting at that particular time; and surely the minister of the parish is the fittest person to decide at what season the public worship may be suspended with least inconvenience to the religious duties of the parishioners. This vestry was called for the purpose of ordering an additional key of the church to be made for the use of the parish churchwarden. This was very irregular; for the minister has, in the first instance, the right to the possession of the key, and the churchwardens have only the custody of the church under him. If the minister refuses access to the church on fitting occasions, he will be set right on application and complaint to higher authorities." The same doctrine is

(1) 5 B. & S. 114; 33 L. J. (Q.B.) 182. (2) 3 Phillim. 167.
(3) 3 Hagg. Ecc. 169, 173.

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referred to by Dr. Lushington in the recent case of *Dewdney* v. *Good* (1) as one of the best established axioms of ecclesiastical law. In that case, decided in the Court of Arches in the year 1861, reported with his usual accuracy by Dr. Middleton in "The Jurist," the churchwardens of the parish of Gussage, in Dorsetshire, accompanied by another parishioner, and acting upon a resolution of the vestry, but against the expressed prohibition of the rector, and without any authority from the bishop, broke open with a crowbar the principal door of the church, and, with the assistance of some workmen, proceeded to alter the position of the pulpit, and to pull down and re-arrange certain of the seats within the church; and the learned judge, Dr. Lushington, most strongly held that all who had taken part in those proceedings had been guilty of a grave ecclesiastical offence. [The learned Judge here quoted at length from the judgment referred to.]

In this case the promoter of the office has withdrawn that portion of his prayer which requested the Court to order the restitution of the articles which had been illegally removed, and the Court is now only prayed to admonish Mr. Cordingley to abstain from such illegal conduct for the future, and to condemn him in the costs which that conduct has occasioned.

I must not forget that there is evidence before me that the offender was not ignorant of the law applicable to this case, and perhaps I am hardly justified in not following in every respect the precedent set me by Dr. Lushington in the recent case of *Dewdney* v. *Good* (1), and in condemning Mr. Cordingley in all the expenses of this suit.

But, having regard to the fact that when this cause first came before me I suggested that the parties should agree upon a statement of the facts, and take the opinion of the Court upon the question of law; that this proposition, which would have most materially diminished the expenses of the suit, was accepted by Mr. Cordingley and not entertained by the promoter; and also having especial regard to the fact that these ornaments were put up without the previous or subsequent sanction of the ordinary, that is, without an original faculty or by a faculty to confirm, I shall

(1) 7 Jur. (N.S.) 637.

not condemn Mr. Cordingley in the whole expenses of the suit. I admonish him to abstain from such illegal practices for the future, and I condemn him in the sum of 100*l.* nomine expensarum.

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Proctors for promoter: *Brooks & Dubois.*
Proctors for defendant: *Moore & Currey.*

THE PRISCILLA.

1870
March 3.

Rule of the Sea—Vessels beating to Windward on the same tack going about.

Two vessels, which had been sailing in company, were beating to windward. They were both close hauled on the same tack, the one ahead and a little to the windward of the other. The leading vessel stood in as near as she could to a shoal, and was then obliged to go about. The other vessel kept her reach. The two vessels came into collision:—

Held, that it was the duty of the following vessel to have gone about at the time she saw the leading vessel go about; and that, as the collision was occasioned by the following vessel neglecting to go about at the proper time, she was to blame for the collision.

THIS was a cause of collision instituted on behalf of the owners, master, and crew, of the schooner *Victory*, against the schooner *Priscilla*. The collision took place about 5 P.M. on the 18th of December, 1869, in the Gull Stream. According to the statement in the petition, the *Victory* was close hauled on the starboard tack, and heading about S. by W., when those on board of her observed the green and red lights of the *Priscilla* about a point and a half on the lee bow of the *Victory*, and distant about half a mile. The *Victory* kept her reach close hauled, and the *Priscilla* was hailed, but she, nevertheless, came into collision with the *Victory;* the stem and port bow of the *Priscilla* with the port midships of the *Victory*.

According to the statement in the answer, the *Priscilla* was close hauled on the starboard tack, heading S.S.W.; the *Victory* had been for some time following the *Priscilla* on the same tack, and was about four points on the starboard quarter of, and distant from a quarter to half a mile from, the *Priscilla*, with her red light visible. When the *Priscilla* had stood as close in to the Goodwin Sands as it was prudent for her to go, her helm was put

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down to bring her on to the port tack, and as she was coming round with her helm hard to port, and before she had got any steerage way on her, the *Victory* stood across her bows, and with her port main rigging caught the jib-boom and bowsprit of the *Priscilla*, and the *Victory* fell alongside of her and struck the *Priscilla* heavily on the port bow.

The judge was assisted by two of the Elder Brethren of the Trinity House.

The substance of the evidence appears from the judgment.

The Admiralty Advocate (*Dr. Deane, Q.C.*), and *Pritchard*, for the plaintiffs.

Butt, Q.C., and *E. C. Clarkson*, for the defendants.

SIR ROBERT PHILLIMORE. The *Priscilla* and the *Victory* had been sailing together, it appears, the greater part of the day, and they had both gone across on the port tack towards the Brake Sand. The *Priscilla* had afterwards got round on to the starboard tack, and was going over towards the Goodwin, expecting no doubt the other vessel to follow her. It appears to us, from the evidence, that the *Priscilla* went as near the Goodwin Sands as she could with safety. It follows, therefore, that she was justified in going about at that time. We think that the result of the whole of the evidence is, that very shortly after this period the collision took place in the way which I will mention.

It is true that the *Priscilla* when she saw that the *Victory* was within 200 yards of her, according to the evidence of her captain, appears to have made no signal by waving a light or otherwise, and she may be to blame, therefore, on that account; but in the opinion of the Trinity Masters, and the Court sees no reason to disagree with them, the absence of this signal did not cause the collision. What she did do we consider was proper, she kept her helm aport and she lowered her peak.

The *Victory's* case is thus stated by her own captain, John Jones. He says, that having gone across on the port tack towards the Brake Sand, the *Priscilla* on the starboard tack passed under his stern; that he then remained on the port tack three or four minutes, and then put about on the starboard tack, that he con-

tinued on the starboard tack close hauled, and then the mate reported a vessel under his lee bow, a point and a half on the lee bow at the distance of half a mile, and that he then saw the green light. That is the evidence which has been given to-day by the captain of the *Victory*.

We think that, looking to the previous history of this case, when the *Victory* saw this green light half a mile off, she must have known that it was the green light of the *Priscilla* with whom she had been in company the rest of the day; that she must have known also that the *Priscilla* had gone about and was standing towards her at this time; and, therefore, as she was the following vessel with this intimation conveyed to her, it was her duty at that time to have gone about, and if she had done so at that distance, which is the distance that she fixes herself, there would have been no collision in this case; consequently, we find that the *Victory* is alone to blame for this collision.

Proctors for plaintiffs: *Pritchard & Sons.*
Proctors for defendants: *Deacon, Son, & Rogers.*

THE JOHANNES.

April 26.

Amendment—Leave to Increase the Amount in which the Suit is Instituted, after Admission by Defendants of their Liability.

In a cause of collision after the defendants' vessel had been arrested and released on bail, the defendants admitted their liability and consented to a reference. The Court afterwards, under special circumstances, granted leave to the plaintiffs to amend the præcipe to institute, by increasing the amount in which the suit was instituted.

E. C. Clarkson, on behalf of the plaintiffs, moved for leave to amend the præcipe to institute, and all subsequent proceedings in the cause, by increasing the amount in which the suit was instituted from 1000*l.* to 1500*l.*

The cause was instituted by the owners of the barque *Linda* against the barque *Johannes*, to recover compensation for damages received by the *Linda* in a collision which took place between the *Linda* and the *Johannes* on the 30th of December, 1869.

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On the 8th of January the solicitors for the plaintiffs received instructions to institute the suit. At that time the repairs to the *Linda* had just been commenced, and the master of the *Linda* reckoned that the cost of the repairs, together with the sum payable to the plaintiffs as compensation for the detention of the vessel during the execution of the repairs, would not exceed 700*l.* Thereupon the suit was instituted in the sum of 1000*l.* The *Johannes* was arrested, and, bail having been given for 1000*l.*, she was released and afterwards sailed to a foreign port. The defendants, on the 19th of February, 1870, filed an admission of their liability, and consented to a reference to the Registrar, assisted by merchants, to ascertain the amount due, but no decree was made. The damage done to the *Linda* turned out to be much more extensive than had been anticipated. The repairs were not completed until the 4th of March; and on preparing the plaintiffs' claim it was discovered that the damages sustained by them in consequence of the collision amounted to 1342*l.* 6*s.* 8*d.*, and a claim for that amount together with interest, and vouchers in support of the items thereof, were filed. No appointment to proceed with the reference had been obtained. The above facts were stated in an affidavit made by one of the solicitors for the plaintiffs, which was used in support of the motion. The affidavit also contained the following statement: "At the time the said vessel was arrested, I believe it would have been impossible to have ascertained the amount of the damage sustained by the plaintiffs, or to have estimated the amount nearer than was done, and it would not have been safe or prudent for them to have waited for the said repairs to have been completed before instituting proceedings or to have allowed the said vessel to leave this country without bail being first obtained, she being . . . a foreign vessel." [He cited *The Meander* (1) and *The Hero.* (2)]

The Admiralty Advocate (*Dr. Deane, Q.C.*), on behalf of the defendants, opposed the application. The defendants have admitted their liability and consented to a reference, and although the reference has not yet been proceeded with, the position of the parties is the same as if a decree had been made in the cause. The

(1) Br. & Lush. 29. (2) Br. & Lush. 447.

Court cannot now increase the amount in which the suit has been instituted. At all events, the Court cannot now increase the amount of bail after the ship has been released: *The Kala mazoo.* (1) 1870 THE JOHANNES.

Clarkson. The plaintiffs only wish to be in a position to obtain a decree for the full amount of their claim; they will be content if the Court will grant leave to increase the amount in which the cause is instituted, without making any order as to the bail.

SIR ROBERT PHILLIMORE. I give the plaintiffs leave to amend the præcipe to institute, by increasing the amount in which the suit is instituted from 1000*l.* to 1500*l.* As Mr. Clarkson is content with this, and does not ask for further security than that already given, it is unnecessary for me to decide whether the plaintiffs are entitled to have fresh bail. The defendants must have their costs of this motion.

Solicitors for plaintiffs: *Ingledew & Ince.*
Proctor for defendants: *Fielder.*

THE JOHN BELLAMY. *March* 29.

Evidence—Ownership of Cargo—Underwriters—Bill of Lading—Practice.

Two vessels, the B. and the E., came into collision. The E. went down, and her cargo was lost. A cause of damage was instituted against the B. by S. and others, who described themselves as owners of the cargo ex E. On the hearing of the cause, the B was pronounced solely to blame, and a reference was directed. At the reference it appeared that the plaintiffs S. and others were underwriters, who had paid the shippers as for a total loss upon the cargo ex E., and to whom the bills of lading had been given up. S. and others produced the bills of lading and the invoices, shewing the prices at which the goods had been invoiced to the shippers. The defendants contended that this evidence was insufficient to enable the Registrar to make his report. A special case was stated by the Registrar for the opinion of the Court:—

Held, that the evidence before the Registrar was insufficient, and that the defendants were entitled to require evidence of a discharge from the owners of the cargo, and better evidence of the value of the cargo, before the Registrar proceeded to report upon the amount of compensation due.

THIS was a special case stated by the Registrar for the opinion of the Court.

(1) 15 Jur. 885.

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The following are the material facts: The ship *John Bellamy* came into collision with the vessel *Eureka*. The *Eureka* was laden with cargo at the time, and in consequence of the collision she sank, and her cargo was wholly lost. Causes of damage were instituted against the *John Bellamy*, one of these (No. 4591) was instituted by Richard Rhod Swann and others, who described themselves as "owners of cargo, now or lately laden on board the vessel *Eureka*." The causes of damage were heard together, and the *John Bellamy* was pronounced solely to blame, and condemned in damages and costs. Thereupon a reference was directed to the Registrar, assisted by merchants, to ascertain the amount of damage, and at the reference the plaintiffs in cause No. 4591 rested their claim upon the following evidence. They proved that they were underwriters on the cargo, and that they had paid the full amount insured as for a total loss upon the same, and that the policies and the bills of lading had been given up to them when such payment was made. The bills of lading were filed in the registry by the plaintiffs, and the names of the shippers of the goods appeared by the bills of lading. Invoices were produced by the plaintiffs, shewing that a portion of the goods shipped were invoiced to the shippers at prices appearing in the invoices, and affidavits made by the shippers were filed, in which it was sworn that the nature of the goods shipped corresponded with the particulars of the plaintiffs' claim, and that the plaintiffs had paid the value of the goods to the shippers. The *Eureka*'s manifest was lost, but a copy of it in the plaintiffs' possession was produced. Save as above stated, there was no evidence to prove the value of the goods, nor to shew who were the true owners of the goods, nor to whom or on whose account the insurance moneys were paid.

The special case concluded with the following statement:—

"The defendants contend that the plaintiffs should prove who were the true owners as aforesaid, and to whom and on what accounts the said insurance moneys were paid, and should procure a discharge from the original owners of the cargo, viz. from those persons on whose behalf the same was shipped, before the Registrar reports that the respective amounts allowed in respect of the said cargo are due to the plaintiffs; and they further contend that until this is done they are unable to investigate and settle the

proper value of the cargo sought to be charged as against the said ship.

"The plaintiffs contend that they are by operation of law (having paid a total loss, and the cargo having been abandoned to them), and also, as holders of the bills of lading of the said cargo, the absolute owners thereof, and, as such, the only proper persons to give a discharge, and that they cannot be compelled to discover the true owners of the said cargo at the time of shipment otherwise than as appears by the said bills of lading, nor to shew that the said insurance moneys were paid to them or on their account further than is shewn by the delivering up of the said policies and bills of lading, and that the plaintiffs are not bound to obtain their discharge.

"The opinion of the Court is desired upon the above question."

March 15. *The Admiralty Advocate* (*Dr. Deane, Q.C.*) and *E. C. Clarkson*, for the plaintiffs. The plaintiffs, the underwriters, having paid for a total loss, are entitled to the same rights as the owners. The plaintiffs have produced the only evidence it is reasonable to expect them to produce of their right to recover the value of the goods. The bills of lading are the symbol of the property in the goods, and the fact that the underwriters are in possession of the bills of lading is primâ facie evidence that the property in the goods has passed to the plaintiffs. If further evidence is necessary, all that can be required is supplied by the affidavits of the shippers. The shippers are the recognized agents of the owners of the goods, and the only persons known to the plaintiffs as representing the owners, and the plaintiffs have paid the value of the goods to them.

Butt, Q.C., and *Cohen*, for the defendants. According to the practice of this court underwriters are not entitled to sue in their own name: *The Regina del Mare.* (1) But it is not intended to insist upon this formal objection. The defendants contend that there is no evidence to shew that the plaintiffs are in a position to give the defendants a valid discharge. It is not denied that the plaintiffs, having paid for a total loss, are subrogated for the assured; but what were the rights of the assured? There is no

(1) Brow. & Lush. 315.

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evidence to shew. A broker or a factor can effect an insurance: the underwriter pays the person with whom the contract of insurance is made. There is no evidence that the money paid to the shippers by the underwriters was paid to them as agents for the owners. It would have been easy for the shippers to have made affidavits stating who were the real owners. The bills of lading are not evidence as against the defendants. The bills of lading may be good evidence as against the owners of the *Eureka*, and yet no evidence as against the defendants. To an action brought by the real owners of the goods against the defendants, it would be no answer to plead that the defendants had paid the value of the goods to the holders of the bills of lading. In any event the property in the goods cannot be affected by the transfer of the bills of lading after the goods have been lost and are, in fact, no longer in existence: *Barber* v. *Meyerstein* (1); *Couturier* v. *Hastie*. (2) Moreover, the plaintiffs are not in a position to give satisfactory evidence of the value of the cargo. The invoice prices are not always a fair criterion of value. Are the defendants to be deprived of the right of having proper evidence of value simply because the plaintiffs happen to be underwriters?

The Admiralty Advocate, in reply.

Cur. adv. vult.

March 29. SIR ROBERT PHILLIMORE. The ship *John Bellamy* was pronounced solely to blame in certain causes of damage instituted against her in this court, and was condemned in damages and costs, the usual reference being made to the Registrar assisted by merchants. It appeared that one of these causes had been instituted "on behalf of Richard Rhod Swann and others, owners of cargo now or lately laden on board the vessel *Eureka*." But these plaintiffs turned out to be not the owners of the cargo at the time of shipping it, but underwriters upon the cargo who had paid for a total loss upon it previously to the institution of the suit. They produced the policies of insurance, which had been given up to them, and the bills of lading, and the invoice and a copy of the manifest.

(1) Law Rep. 4 H. L. 317. (2) 5 H. L. C. 673; 25 L. J. (Ex.) 253.

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Some questions of law arising upon these facts have been referred to me from the Registrar in a special case in which the respective contentions of the litigants are thus stated. [Here the learned judge read the concluding paragraphs of the special case which are set out above.]

That the underwriter must sue in the name of the owner in this court is a position admitted by the counsel on both sides.

It is an equally incontrovertible position that where, as in this case, an abandonment by the shippers to the underwriters is proved, all that the shippers can give is passed to the underwriters. The question is, have the shippers given such a title to the underwriters as enables them to claim from the defendants the damages and costs due to the owners of cargo on board the *Eureka*, or, in other words, have the shippers proved that they were, or that they represent, the owners of the cargo who are to be indemnified by the party condemned in these damages. The defendants, the obligati ex delicto, have certainly a right to be secured against the liability of a future demand from the possessors of a better title than that which has been furnished by the shippers to the underwriters. The defendants contend that they would not have this security if they paid the compensation awarded to the underwriters on the present evidence, and that they are entitled to insist on the production of a discharge from the original owners which the underwriters cannot or will not obtain from the shippers. The underwriters maintain that they have produced all the requisite evidence; they rely on the fact of the shipment of these goods by the shippers proved by the bills of lading; on the fact of the insurance of these goods by the shippers, proved by the return of the policies and receipt for the money paid upon the insurances, and upon the proposition of law that the shipper is the agent of the owner so as to bind him in this matter, and to secure the defendant against any future demand from him.

I have to consider whether this evidence of title to the property be adequate and such as the defendants must accept. First, as to the bill of lading: this instrument is not per se incontrovertible evidence that the property specified in it has passed to the holder. A bill of lading is a contract of carriage disclosing the names of shipper and consignee only, and does not prove that the shipper

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is the owner. These bills are usually drawn out in duplicate: in the present instance I observe that the bill of lading has these words:—"In witness whereof the master or purser of the said ship has affirmed to four bills of lading all of this tenor and date, the one of which bills being accomplished, the other three to stand void." It may be that one of these bills of lading has been delivered at an earlier date to some person other than the underwriter, which other person would on the ground of his earlier possession of the bill of lading have a prior title to the goods. *Barber* v. *Meyerstein* (1); *Couturier* v. *Hastie*. (2)

With respect to the fact of insuring, the insured may have insured as agent or have had an insurable interest of his own in the goods distinguishable from property in them. With respect to the receipt of the money paid on the insurance, the insurer is only concerned in ascertaining that the money is paid to the person who insured, who, as I have already said, is not necessarily the owner of the goods.

With respect to the contention that the shipper is the agent of the owner, and would bind him by his act in this matter, and therefore secure the defendant from future liability, no authority has been cited which satisfies me that this proposition of law is sound. The shipper is the agent of the owner to put the goods on board, but I am not satisfied that the insurance of the goods is within the ordinary scope of his agency; and no special circumstance is suggested in the case before me. It has also been contended by the counsel for the defendants that they are entitled to the best evidence as to the value of the goods which they are to pay. The underwriters of course do not know the value of the goods, and the invoice does not necessarily furnish it: the real value may be and often is from various causes not represented in the invoice, and it is urged that if the owners were disclosed the defendant would have a means of ascertaining the true value of which he is now deprived, and that the underwriter ought not to be allowed to stand in a more favourable position than the owner whom he represents. After some consideration I am of opinion that the defendants are entitled to require evidence of a discharge from the original owners before the underwriters can enter upon the

(1) Law Rep. 4 H. L. 317. (2) 5 H. L. C. 673; 25 L. J. (Ex.) 253.

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investigation of the amount of compensation for which the defendants are liable.

I do not mean, however, to decide that sufficient evidence of the value of the goods may not be obtained without a personal examination of the owners, and incurring the expense which such an examination in the case of foreign owners must entail.

I make no order as to costs.

Solicitors for plaintiffs: *Lowless & Nelson.*
Solicitors for defendants: *Westall & Roberts.*

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June 14.

Jurisdiction of Court of Passage—The County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *s.* 3—*Admiralty Jurisdiction—Necessaries—Appeal.*

From the decision of the Court of Passage in an Admiralty cause, an appeal lies to the Court of Admiralty.

In an Admiralty cause, instituted in the Court of Passage to recover a claim for necessaries supplied to a vessel in the port of Liverpool, the defendants in their answer alleged that at the time the necessaries were supplied the vessel belonged to the port of Liverpool, and that at the time of the institution of the suit a part owner of the vessel was domiciled in England. These allegations were objected to by the plaintiffs as irrelevant, and the Assessor of the Court of Passage ordered them to be struck out.

On appeal to the Court of Admiralty the decision of the Assessor was reversed on the ground that the County Courts Admiralty Jurisdiction Act, 1868, does not confer upon the Court of Passage a more extensive jurisdiction as to any claim for necessaries, than that exercised by the Court of Admiralty.

THIS was an appeal from the decision of the learned Assessor of the Court of Passage of the borough of Liverpool. A cause of necessaries was instituted on the 10th of November, 1869, in the Court of Passage, on behalf of the Muntz Metal Company, against the vessel *Dowse*, and against the owners of the vessel, and against all persons having or claiming to have any interest therein. The declaration alleged that the plaintiffs, in the month of September, 1869, by the order of Captain J. Forsdyke, and the owners of the vessel, supplied her, in the port of Liverpool, with metal sheathing

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and nails, then necessary for the said vessel, to the value of £146 12*s.* 7*d.*

The defendants' answer contained inter alia the following articles:—

1. At the time when the alleged necessaries, the subject matter of this suit, were supplied to the said vessel, the said vessel belonged to the port of Liverpool.

2. At the time of the institution of this suit, there was domiciled in England a certain person who was, at the time when the said alleged necessaries were supplied, an owner or part owner of the said vessel.

3. On the 4th of June, 1869, the said vessel was mortgaged to one George Charles Stewart, to secure the sum of £1700, and interest upon the said sum, at the rate of 10*l.* per centum per annum.

4. On the 13th of August, the said Forsdyke agreed to buy the said vessel from the said George Charles Stewart, for the sum of 1700*l.*

5. On the 5th of November aforesaid, the said George Charles Stewart, in consideration of the sum of 1237*l.* 15*s.* 10*d.*, assigned to the defendants their interest in the agreement referred to in the last preceding article.

6. On the 5th of November aforesaid, the said George Charles Stewart, for the consideration aforesaid, transferred to the defendants the mortgage referred to in the third article.

7. The whole of the money secured as aforesaid to the defendants is still due and unpaid.

9. At the time when the said order was given, both the defendants and the said George Charles Stewart were resident and carrying on business at Liverpool.

The plaintiffs moved the learned Assessor of the Court of Passage to reject the said 1st, 2nd, and 9th articles in the answer, upon the ground that they were irrelevant and insufficient, and no answer to the plaintiffs' claim. Upon the hearing of the motion, the following order was made by the learned Assessor of the Court of Passage.

Upon hearing counsel on both sides, it is ordered that the answer of the defendants herein be amended by striking out the

1st, 2nd, and 9th sections of the same, on the ground that the said sections are irrelevant and insufficient, and afford no answer to the plaintiffs' claim; and secondly, on the ground that the said 1st, 2nd, and 9th sections of the said answer are in the nature of a plea to the jurisdiction of this Court, the Assessor being of opinion that this Court has jurisdiction in the subject matter of the claim. And it is further ordered, that the question of costs of and incidental to this application be reserved until the determination or hearing of the cause, with leave to the defendants to appeal to the High Court of Admiralty on the question of this motion.

The defendant then filed in the registry of the Court of Admiralty a declaration of intention to appeal. (1)

The appeal now came on for hearing.

May 31. *Potter*, for the defendants. Prior to the passing of the 3 & 4 Vict. c. 65, s. 6, this Court had no jurisdiction to decide claims for necessaries: *The Neptune.* (2) That statute applies to claims for necessaries supplied to foreign vessels only. The jurisdiction conferred by the 3 & 4 Vict. c. 65 has been extended by the Admiralty Court Act, 1861 (24 Vict. c. 10), s. 5; but according to that Act this Court has not jurisdiction to entertain a claim for necessaries supplied to a British ship in the port to which she belongs, or to a claim for necessaries supplied to a British ship, any of the owners

(1) The declaration was as follows:—

"The declaration of Isham Henry Edward Gill, of No. 4, Cook Street, Liverpool, attorney for the said vessel, her furniture and apparel.

"Declares that in a certain cause now pending in the Court of Passage of the borough of Liverpool, promoted by the Muntz Metal Company, Limited, of French Walls, near Birmingham, in the county of Warwick, against the vessel, the *Dowse*, at the time of the institution of the suit lying in the port of Liverpool, her furniture and apparel, Percival A. Pickering, Esq., Q.C., the Assessor of the said Court, did on the 4th day of April, 1870, order as follows:—That the answer of the defendants be amended by striking out the 1st, 2nd, and 9th sections of the same on the ground that the said sections are irrelevant and insufficient, and afford no answer to the plaintiffs' claim; and secondly, on the ground that the said 1st, 2nd, and 9th sections of the said answer are in the nature of a plea to the jurisdiction of the Court, the Assessor being of opinion that this Court has jurisdiction on the subject matter of the claim.

"Wherefore your declarant appeals to your honourable Court to reverse the said decree or order, or to make such order in the premises as to your honourable Court shall seem meet.

"Dated at Liverpool, this 19th day of May, 1870."

(2) 3 Hagg. Adm. 129; on appeal, 3 Knapp. 94.

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of which are domiciled in England: *The Comtesse de Frègeville.* (1) It cannot have been intended by the legislature to confer upon the County Courts a more extensive jurisdiction than that exercised by this Court. The County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71) is entitled "An Act for conferring Admiralty Jurisdiction on the County Court;" and the Act does not do more than confer "*admiralty jurisdiction.*" The phrase "admiralty jurisdiction" can only be explained by reference to the jurisdiction exercised by this Court. The 26th section of the Act provides that an appeal may be made from the decree of a County Court in an Admiralty cause to this Court; and the 6th and 32nd sections provide that the proceedings in the County Court in Admiralty causes may, in certain cases, be transferred to this Court. These provisions make it clear that the jurisdiction conferred upon the County Courts is not more extensive than the jurisdiction exercised by this Court. The Court of Passage has, within the area over which its jurisdiction extends, the like jurisdiction as the County Court of Lancashire, holden at Liverpool.

W. C. Gully, for the plaintiffs. It must be admitted that this Court has not jurisdiction to entertain, in the first instance, a claim such as that preferred in this case. But the jurisdiction of the Court of Passage depends upon the words of the County Courts Admiralty Jurisdiction Act, 1868. The 3rd section of that Act confers jurisdiction "as to any claim for . . . necessaries." Why should a limited construction be put upon the words "any claim?" May not the legislature have intended by these words to confer upon the county courts having admiralty jurisdiction, and upon the Court of Passage, a more extensive jurisdiction than this Court possesses? The County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), clearly confers upon the inferior courts jurisdiction more extensive than this Court possesses. The phrase "admiralty jurisdiction" used in the County Courts Admiralty Jurisdiction Act, 1868, is not intended to define the extent of the jurisdiction; it is used only to point out the manner in which the jurisdiction is to be exercised. It means that the County Courts and the Passage Court shall, subject to the provisions of the Act, proceed in Admiralty causes according to the principles and prac-

(1) Lush. 329.

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tice of the Court of Admiralty. There is nothing anomalous in a court having appellate jurisdiction to decide matters which could not properly be brought before it in the first instance. As to the provisions contained in the Act for the removal of Admiralty causes from the inferior courts to this Court, that is the express provision of the legislature, and it is quite in accordance with the course of modern legislation to give increased facilities to suitors proceeding in the inferior courts. It may well be that the legislature intended that this Court should have more extensive jurisdiction in causes removed here from a County Court than in causes instituted here.

Potter, in reply. The County Courts Admiralty Jurisdiction Amendment Act, 1869, does, no doubt, give to the County Courts and the Passage Court a more extensive jurisdiction than this Court possesses. But in the title of that Act these words are inserted: "To give jurisdiction in certain maritime causes."

Cur. adv. vult.

June 14. SIR ROBERT PHILLIMORE. This is an appeal from the decision of the learned Assessor of the Court of Passage of the borough of Liverpool. In that Court a cause of necessaries had been instituted on behalf of the Muntz Metal Company against the vessel *Dowse* for necessaries supplied. The answer of the defendants contained the following articles amongst others: — [The learned Judge read the articles objected to.] These articles were objected to as irrelevant, and the objection was sustained by the learned Assessor of the Court of Passage, who thereby decided that the Court had jurisdiction to entertain the claim. From this decision an appeal has been prosecuted to this Court. I should observe that no question has been raised before me as to whether under the 25th section of that statute an appeal lies from the Court of Passage to the High Court of Admiralty. I am inclined, however, to think that the appeal does lie, and that the Court of Passage is, in this respect, in the same category as county courts having Admiralty jurisdiction.

The question is as to the true construction of the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), the title of which is "An Act for conferring Admiralty Jurisdiction upon the County Courts." The 3rd section enacts that:—

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"Any county court having Admiralty jurisdiction shall have jurisdiction and all powers and authorities relating thereto to try and determine, subject and according to the provisions of this Act, the following causes (in this Act referred to as Admiralty causes):—

"(1.) As to any claim for salvage. Any cause in which the value of the property saved does not exceed £1000, or in which the amount claimed does not exceed £300.

"(2.) As to any claim for towage, necessaries, or wages. Any cause in which the amount claimed does not exceed £150."

It has been contended that there is no limitation which narrows the construction of the words "any claim," and though it is admitted that the High Court of Admiralty would have no original jurisdiction in this matter, that it would have an appellate jurisdiction, and, also, that it might, under the authority of the 6th section, order the cause to be at once transferred to this Court, and so, in fact, exercise original jurisdiction. There is no doubt that the High Court of Admiralty has exercised, and may exercise, an appellate jurisdiction in a matter over which it has no original jurisdiction. The High Court of Admiralty was formerly the court of appeal in revenue cases decided in the Colonial Admiralty Courts; and under the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), it has an appellate jurisdiction as to claims arising out of agreements for the use or hire of a ship and the carriage of goods in a ship, as to which there was no original jurisdiction. But I think I must construe the County Courts Admiralty Jurisdiction Act, 1868, independently of these considerations. That statute, by the 2nd section, professes to confer only an Admiralty jurisdiction upon certain courts, and then, by the 3rd section, enacts that a court having Admiralty jurisdiction shall try and determine any claim for necessaries, that is to say, in my opinion, any claim for necessaries which may properly be tried by a court having Admiralty jurisdiction. Under the old law, previously to the statutes 3 & 4 Vict. c. 65, and the Admiralty Court Act, 1861, this Court had no jurisdiction over a claim for necessaries: *The Neptune.* (1) By the 6th section of the former statute such jurisdiction was conferred on it in cases of claims for neces-

(1) 3 Hagg. Adm. 129; on appeal, 3 Knapp. 94.

saries supplied to any foreign ship; and by the 5th section of the latter statute further jurisdiction was conferred on it over any claim for necessaries supplied to any British ship, subject to two limitations, first, that the necessaries should have been supplied elsewhere than at the port to which the ship belonged; and secondly, that at the time of the institution of the cause no owner or part owner of the ship should have been domiciled in England or Wales. I think the term "Admiralty jurisdiction" in the County Courts Admiralty Jurisdiction Act, 1868, must be construed with reference to these limitations; and the correctness of this construction is confirmed by a reference to the title of the County Courts Admiralty Jurisdiction Amendment Act, 1869, "An Act to amend the County Courts [Admiralty Jurisdiction] Act, 1868, and to give jurisdiction in certain maritime causes." I am glad to find that the Court of Common Pleas has put the same construction upon the statute in question in the case of *Everard* v. *Kendall* (1) recently argued before them.

I must decide, therefore, that the articles in the answer which took objection to the jurisdiction of the Court were rightly pleaded, and I must reverse the decision of the learned Assessor of the court below, which ordered them to be struck out. Should the plaintiffs wish to appeal to the Judicial Committee of the Privy Council, I will grant the necessary permission.

Attorneys for plaintiff: *Chester & Urquhart.*
Attorneys for defendants: *Gregory, Rowcliffes, & Co.*

(1) Law Rep. 5 C. P. 428.

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Salvage—Crew—Ships belonging to the same Owners.

The N. and the S. were steam-vessels belonging to the same owners. The N. in the prosecution of a voyage observed the S. in a disabled condition on the high seas. By means of exertion and labour on the part of the crew of the N., the N. got the S. in tow, and towed her into a port of safety. In rendering this service the N. deviated from her voyage.

Held, that the crew of the N. were entitled to sue the S. for salvage remuneration.

The Maria Jane (14 Jur. 857) distinguished.

This was a cause of salvage instituted on behalf of the boatswain and seventeen seamen, part of the crew of the steamship *Nero*, against the steamship *Sappho*. The articles of the petition were substantially as follow:—

1. The *Nero* is a screw steamer of 1055 tons gross register with engines of 95-horse power nominal.

2. In the month of February, 1869, the *Nero* sailed from Cardiff with a cargo of iron and tin, bound upon a voyage thence to Galatz and home to the United Kingdom. She was manned by a crew of twenty-three hands all told, composed of master, mate, second mate, engineer, second engineer, and third engineer, besides the plaintiffs. The plaintiffs formed the whole of the crew other than the captain, officers and engineers, and before sailing signed the usual articles to serve on board the *Nero* in their several capacities for the voyage.

3. On the 4th of March, at about 7·30 A.M., the *Nero* in the prosecution of her outward voyage was 160 miles to the eastward of Malta. The wind was blowing fresh from the W. and was fair for the *Nero* prosecuting her voyage, and there was a heavy sea running.

4. At such time those on board the *Nero* observed at some distance a screw steamer apparently disabled. The *Nero* bore down to her and she was discovered to be the steamship *Sappho* (the vessel proceeded against in this cause), belonging to the same owners as the *Nero*.

5. The *Sappho* had lost her screw fifteen days previously, and nearly all her canvas had been blown away; she had lost her

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bulwarks and her two starboard boats, and was lying completely unmanageable with the sea making a clean breach over her. Her provisions were also getting short.

6. Three days previously the mate of the *Sappho* with four hands had left in one of her boats to endeavour to obtain assistance. They never were or have been since heard of, and the boat was subsequently picked up empty.

7. The *Sappho* had only one boat left, and her remaining crew were considerably exhausted by the extra work.

8. Under these circumstances the master of the *Nero* determined to take the *Sappho* in tow. As it was impossible for the *Nero* to approach the *Sappho* with safety, or to launch a boat in the heavy sea, the lead line of the *Sappho* was made fast to a ladder and veered down upon the *Nero*. There was great difficulty in picking up the line and getting it on board the *Nero*, and William Peacock, one of the plaintiffs, in securing the ladder slipped from the rail and was barely caught by some of the crew and saved from falling into the sea.

9. By means of this line and after four hours' exertion the 11-inch tow rope of the *Sappho* was got on board the *Nero*, and secured to the mizen mast. The *Nero* then commenced to tow the *Sappho*, but about 12 P.M. the tow rope broke, owing to the rolling of the *Sappho* in the heavy sea.

10. The *Nero* laid by the *Sappho* till daylight, when a boat was launched and manned by six hands (some of whom were the plaintiffs), who at great risk to themselves, and after making three trips to the *Sappho* through a high sea, succeeded in bringing and securing a new 11-inch hawser on board the *Nero*, which again commenced to tow.

11. The wind continued to blow strongly from the W., and on the 7th the weather was so severe that the *Nero* had to run for shelter under the lee of Sicily.

12. On the 8th the *Sappho* and her cargo and crew, after a service which had lasted five days and four nights, were brought safely into Malta by the *Nero*. Shortly after which the *Nero* resumed her voyage to Galatz.

13. During all the time aforesaid, the weather was very heavy and the wind contrary, and the plaintiffs underwent great and

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extraordinary fatigue and exertion in constantly, by day and night, attending to the tow ropes; and they incurred some danger while steering the *Nero*, owing to the strain brought upon her rudder and wheel by the rolling and sheering of the *Sappho*, and when the tow rope broke and while getting the hawsers from the *Sappho*.

14. In the course of rendering the aforesaid services to the *Sappho*, the *Nero* materially deviated from the voyage upon which the plaintiffs had agreed to serve; and the plaintiffs performed services and incurred labour and risks other than and beyond those which were within the scope of their original agreement to serve on board the *Nero*.

The owners of the *Sappho*, who appeared as defendants in the suit, alleged in their answer, inter alia, as follows:—

"6. The allegations contained in articles 5, 7, 8, 10, and 13 of the petition are greatly exaggerated, and the allegations contained in article 15 thereof are untrue."

"7. The plaintiffs did not perform services or incur labour and risks other than or beyond those which were within the scope of their agreement with the defendants. On the contrary, they performed only such services as they were bound to render under and by virtue of their agreement to serve as mariners of the *Nero*, and the defendants submit that the plaintiffs are not entitled to any salvage remuneration for their services to the *Sappho* or her freight."

The value of the *Sappho*, together with her freight and coals which were on board for ship's use, was fixed by agreement filed in the registry at the sum of 18,174*l*.

The case now came on for hearing.

The plaintiffs proved their case by affidavits, and put in evidence a protest made by the master of the *Sappho*, at Malta, which confirmed most of the important statements contained in the petition. The evidence, however, failed to establish that the plaintiffs had incurred any risk of life. The ship's articles, signed by the crew of the *Sappho*, were put in evidence. The articles were in the ordinary form, and contained the usual clause binding the crew to obey the lawful commands of the master in everything relating to the ship. It appeared from the articles that

the wages of the crew were payable monthly. The sum of 59*l.* 10*s.* represented the sum due to the plaintiffs per month, and the sum of 40*l.* the sum due to the rest of the crew, exclusive of the master, per month.

The Admiralty Advocate (*Dr. Deane, Q.C.*), and *Gibson*, appeared for the plaintiffs; they cited *The Caroline* (1); *The Collier* (2); *The Maria Jane* (3); *The Waterloo* (4).

E. C. Clarkson, for the defendants, contended that no salvage remuneration could be recovered. In the case of *The Maria Jane* (3), Dr. Lushington decided that when ships belong to the same owners, salvage cannot be awarded for services rendered by one to the other. Ever since that decision it has been commonly understood that salvage cannot be claimed in cases such as the present. There are many great companies owning large fleets of vessels, and assistance is constantly being rendered by one vessel of the fleet to another, but in such cases salvage is never claimed by the crew. The crew have not acted beyond the scope of their duty. They were bound by the ship's articles to do what they did do, and they are paid by wages for their time and labour. If the Court should decide that salvage is due, a small amount only should be awarded. The ship was the principal agent in the service, and the master and officers, who are entitled to the principal share of salvage, if salvage is due, are not plaintiffs in the present action.

The Admiralty Advocate, in reply. *The Maria Jane* (3) does not overrule *The Waterloo* (4). It is clear salvage cannot be claimed in respect of services rendered by the ship; but there is no reason why the crew should not be remunerated for the risk they have incurred, and the extra trouble and exertion they have undergone. They have rendered services which were beyond the scope of their duties: *The Florence* (5); *The Warrior* (6); *The Harriott* (7); *The Minnehaha* (8).

SIR ROBERT PHILLIMORE. It is clear that the services rendered in this case were of such a nature as to fall within the ordinary

(1) Lush. 334.
(2) Law Rep. 1 A. & E. 83.
(3) 14 Jur. 857.
(4) 2 Dods. 433.
(5) 16 Jur. 572.
(6) Lush. 476.
(7) 1 W. Rob. 439.
(8) Lush. 335.

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definition of salvage services. But it is contended by the defendant's counsel that, inasmuch as the *Nero* and *Sappho* belonged to the same owners, salvage reward cannot be recovered. It is said that the services rendered by the crew of the *Nero* were within the scope of the duty they were bound by the ship's articles to perform. The articles are in the common form, and contain no express provisions requiring the crew to render assistance to the *Nero*, or affecting in any way their right to salvage reward. It is true that the articles contain the usual provision binding the crew to obey the lawful commands of the master; but it is clear that this clause would not operate to deprive the crew of their right to salvage reward for assistance rendered by them to any other vessel in distress on the high seas, and it cannot, I think, have any special operation in the circumstances of the present case.

It was strongly contended by Mr. Clarkson, on the authority of *The Maria Jane* (1), that in no case where two ships belong to the same owner can the crew of one recover salvage reward for assistance rendered to the other—no matter how important the assistance, or how great the risk incurred. I am bound to admit that the language of the judgment in *The Maria Jane* (1) is broad enough to afford considerable support to the proposition contended for, although, at the same time, when the circumstances of that case are carefully considered, it will be found that the decision may well rest upon other grounds. I cannot help observing that it does not appear, from the report of *The Maria Jane* (1), that the attention of the learned judge who decided that case was directed to the important and luminous judgment delivered by Lord Stowell in the case of *The Waterloo* (2), and it appears to me that the language then used by Lord Stowell entirely disposes of the argument advanced on behalf of the defendants in the present case. It is true that in the case of *The Waterloo* (2); Lord Stowell pointed out that the salvor's ship did not belong to the same owners as the ship to which the services were rendered, and that, although the owners of the latter ship were the charterers of the former, that was not sufficient to support the argument built upon identity of interest. But the language used in the course of the judgment goes far beyond that point. Lord Stowell says that the right to

(1) 14 Jur. 857. (2) 2 Dods. 433.

salvage reward "is what the law calls *jus liquidissimum*, the clearest general right that they who have saved lives and property at sea should be rewarded for such salutary exertions; and those who say that they are not bound to reward, ought to prove their exemption in very definite terms, and by arguments of irresistible cogency." After alluding to the grounds of exemption relied upon, the charterparty and instructions, and the usage, he goes on to say:—"I confess that I think the claim of being discharged from a liability to salvage is one which a Court would not be justified in admitting, unless the discharge appeared in express terms, and in a contract that, by the use of clear and explicit language, should remove all doubt respecting the common understanding of both parties. A clear and general right ought not to be ousted by questionable expressions and violent constructions. In these instruments, which are framed with minute attention to a great many subjects that are likely to occur, provision is made respecting freight, averages of different kinds, demurrages, employment in warfare, and several other possible occurrences. Salvage performed to others is certainly nowhere included in any of these provisions, and it is not distinctly mentioned by itself; nor is it within the competency of the Court to include it in any of them by any fair interpretation, and still less can it insert it as a substantive part of the agreement."

It seems to me clear, from this language, that Lord Stowell intended to lay down the law that the general right to salvage reward could be ousted only by virtue of an express agreement, framed in the clearest and most binding terms. To decide that the defendants are absolutely exempt from all obligation to pay salvage to the plaintiffs in the present case would, as it seems to me, be to strike a severe blow at the whole principle which governs salvage remuneration, and I am satisfied I should be unduly straining the case of *The Maria Jane* (1), if I were to hold that the decision in that case governed the present.

The question then arises, to what sum are the plaintiffs entitled? The *Sappho* was, no doubt, in great need of assistance at the time the *Nero* fell in with her, and the *Nero* was able to render, and did render, just such assistance as she was in need of. The

(1) 14 Jur. 857.

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value of the *Sappho*, her cargo and freight, has been fixed by agreement at 18,174*l*. The service lasted five days during tempestuous weather. But it is to be remembered that the services were effected mainly by the instrumentality of the ship, and that the plaintiffs are only a portion of the crew, and incurred no risk of life, so that they are entitled to remuneration only at a low rate. I award 350*l*., and direct that sum to be distributed amongst the plaintiffs according to their rating.

Proctor for the plaintiffs: *H. C. Coote.*
Solicitor for the defendants: *Thomas Cooper.*

June 24.

THE MINNEHAHA.

Interrogatories—Discovery—Knowledge, Information, and Belief—The Admiralty Court Act, 1861 (24 *Vict. c.* 10), *s.* 17—*The Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *ss.* 50, 51, 52—*Practice.*

9 QBD 165

The plaintiffs, in a cause, applied to the Court for leave to deliver certain interrogatories to the defendant. The application was made upon an affidavit of the plaintiffs and their solicitor, stating that the deponents believed that the plaintiffs would derive material benefit in the cause from the discovery which they sought, and that there was a good cause of action upon the merits. The interrogatories asked, among other things, whether any and what documents relating to the cause were in possession of the defendant. The defendant opposed the application upon the ground that the Court ought not to grant leave to the plaintiffs to deliver interrogatories for the discovery of documents without an affidavit by the plaintiffs of their belief that some document, to the production of which the plaintiffs were entitled, was in the possession or power of the defendant. The Court overruled the objection, and granted the application.

In answer to interrogatories delivered by the plaintiffs in a cause by leave of the Court to be answered by the defendant by affidavit in the usual way, the defendant stated upon affidavit, "I am personally wholly unacquainted with the facts . . . and am unable to answer any of them from my own knowledge, save as hereafter appears":—

Held, upon an application on behalf of the plaintiffs to direct the defendant to give by affidavit further and fuller answers, that the affidavit in answer was insufficient, and that the defendant was bound to answer according to her information and belief.

THIS was a cause of bottomry instituted against the brig *Minnehaha* and freight by Messrs. Drake, Kleinwort, & Cohen, who alleged that they were the legal holders of a bottomry bond on

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the brig and her freight. Richard Goodyear, the owner of the brig at the time of the institution of the suit, entered an appearance in the suit, and afterwards died. After his death an appearance was entered by Jane Goodyear, his widow and executrix.

May 10. *E. C. Clarkson*, on behalf of the plaintiffs, now moved for leave to deliver to the defendant, Jane Goodyear, the following interrogatories (inter alia) to be answered by her by affidavit in the usual way.

1. Did not Henry Burgess, the master of the above-named vessel, *Minnehaha*, on the 20th of October, 1868, or on some and what other day, execute a bond of bottomry on the said vessel and her freight? Was not the said vessel then lying at the port of New Orleans, and was not she then bound for the port of Havana?

2. Was not the said bond given for the purpose of securing payment to Ping Brothers, or some other, and what person or persons, of the sum of 1025 dollars in gold coin, or some, and what other sum, on presentation of the said bond after the safe arrival of the said vessel at the said port of Havana?

3. Did not the said vessel afterwards sail from New Orleans, and did she not afterwards arrive at the said port of Havana? When did she so arrive?

4. When the said Henry Burgess executed the said bond, was he not without funds and credit at New Orleans, and was he not compelled to obtain the advance for securing which the said bond was given for the necessities of the said vessel? Had Richard Goodyear, deceased, who was, while living, the defendant in this cause, taken any and what measures to supply the said master with funds or credit at New Orleans before he executed the said bond?

5. Did the said Richard Goodyear at any time, and when, first receive information from the said master, and whether or not from any one else, and from whom, by name, of his (the said master's) intention to execute, and whether or not of his having executed the said bond?

6. Did the said Richard Goodyear take any and, if any, what measures to furnish the said master with funds to enable him to pay, and did the said Richard Goodyear take any and what measures to pay the amount secured or purported to be secured by the said

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bond, either before or after the arrival of the said vessel at the said port of Havana?

10. Was the said R. Goodyear in a condition, and able to furnish the said master with the necessary funds to the amount of 250*l.* at Havana if he had communicated with the said R. Goodyear by telegraph before executing the said bond at Havana?

11. Have you in your possession or power any documents or document relating to the said bonds or either of them, or in any wise relating to the matters in question in this cause, and have you any and what objection to produce the same documents or document?

12. Had you or the said R. Goodyear formerly any such document or documents in your or his possession or power which are or is not now in your possession or power? If yes, what has become of such documents and document?

The application was supported by an affidavit of the plaintiffs and their proctors, which stated that the deponents believed that the plaintiffs would derive material benefit in the cause from the discovery they sought, and that there was a good cause of action upon the merits.

Charles Russell, on behalf of Jane Goodyear, the defendant, objected to the 11th and 12th interrogatories, upon the ground that the affidavit contained no statement that the deponents believed that any document to the production of which the plaintiffs were entitled was in the possession or power of the defendant.

The provisions of the 17th section of the Admiralty Court Act, 1861, shew that the practice of the Court as regards applications such as the present, must be governed by the provisions of the 50th, 51st, and 52nd sections of the Common Law Procedure Act, 1854. These sections of the Common Law Procedure Act must be read together, and a discovery of documents can only be granted upon such affidavit as is mentioned in the 50th section.

Clarkson, in reply. This Court has many of the powers of a Court of Equity, and it is clear that such an objection as the present would not prevail in the Court of Chancery: Daniel's Chancery Practice, 4th ed. p. 443. In the *Mary or Alexandra* (1)

(1) Law Rep. 2 A. & E. 319.

it is expressly stated in the judgment, page 322, that the practice of this Court, as regards interrogatories, must be moulded rather in conformity with the practice of the Courts of Equity than of Common Law. The objection is untenable even according to the rules of practice of the Common Law Courts.

SIR ROBERT PHILLIMORE. I shall make the order asked for, and in so doing, I am satisfied that I am acting in accordance with the principles adopted by the Court of Chancery, and I believe that I am not infringing any established rule of the Courts of Common Law.

The order was drawn up and served, and the defendant filed in answer to the interrogatories an affidavit, the material part of which was as follows:—

1. I am personally wholly unacquainted with the facts inquired about by the said interrogatories, and am unable to answer any of them from my own knowledge, save as hereinafter appears.

2. In answer to the 10th interrogatory, I say that the late R. Goodyear was in a condition and able to furnish the said Henry Burgess with the sum of 250*l.* had it been necessary, or had he been informed by the said Henry Burgess that he required any funds. The said vessel was five weeks at Havana, which was ample time for return of post from England. There was also immediate telegraphic communication between Havana and Liverpool.

3. In answer to the 11th interrogatory, I say that I have not in my possession any document or documents relating to the said bonds, or relating to the matters in question in this cause, except a copy charterparty of the ship *Minnehaha,* received in or about February, 1869.

4. In answer to the 12th interrogatory, I say that I verily believe the said R. Goodyear had no other documents in his possession, except those above mentioned.

5. I do not object to produce either of the said documents.

June 24. *Clarkson* moved the Court to direct the defendant to give by affidavit further and fuller answers to the interrogatories. It is not sufficient for the defendant to say that she cannot answer from her own knowledge, she is bound to answer

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according to her information and belief. According to the practice of the Court of Chancery, a defendant, in answer to the bill, must answer according to his information and belief. The defendant is also bound to state whether she ever had any documents in her possession.

Russell, for the defendant. The defendant is only bound to state what is within her own knowledge. What she has heard, or what she may believe, may be wholly untrustworthy.

SIR ROBERT PHILLIMORE. I think the defendant must answer the interrogatories according to her knowledge, information, and belief. If she has no information or belief concerning the matters upon which she is interrogated, she can say so, and that will be a sufficient answer. The defendant must also answer the 12th interrogatory more explicitly. I shall order the defendant to give by affidavit further and fuller answers.

Proctors for plaintiffs: *Rothery & Co.*
Proctors for defendants: *Pritchard & Sons.*

July 14.

THE NORMANDY.

Limitation of Shipowners' Liability—The Merchant Shipping Act Amendment Act, 1862 (25 & 26 *Vict. c.* 63), *s.* 54—*Jurisdiction—The Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 514—*The Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *ss.* 13, 34—*Vessel or Proceeds thereof under Arrest—Injunction to restrain Actions at Common Law.*

Two vessels, the *Normandy* and the *Mary*, came into collision. In consequence of the collision the *Normandy* sank at sea, and was lost, together with all her cargo, and some of her crew and some passengers on board her were drowned; and the *Mary* and her cargo were damaged. A damage suit was instituted in the Court of Admiralty by the owners of the *Normandy* against the *Mary*, and bail was given in the suit by the owners of the *Mary* in pursuance of an undertaking contained in a præcipe for a caveat warrant. A cross-suit was instituted in the Admiralty Court against the *Normandy* by the owners of the *Mary* and by the owners of the cargo of the *Mary*; the owners of the *Normandy* paid into court the amount in which the cross-suit was instituted. Whilst these suits were pending, the owners of the *Normandy* instituted in the Court of Admiralty a suit of limitation of liability, and, before the hearing of the damage suits, applied to the Court for an order to stop all actions pending in relation to their liability for loss occasioned by the collision:—

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The Court held that it had jurisdiction to entertain the suit for limitation of liability, and granted, upon terms, an order to stay all actions pending in any other Court relating to the subject-matter of the suit.

The order was served upon M., the plaintiff in an action at common law brought against the London and South Western Railway Company, who were the owners of the *Normandy*, to recover damages for the loss of goods, forming part of the cargo of the *Normandy*, which had been received by the company in London to be carried for M. from London to Jersey:—

Motion on behalf of M. to dissolve the order, so far as it affected M., refused.

THIS was a cause of limitation of liability (No. 5366) instituted on behalf of the London and South Western Railway Company, as owners of the steamship *Normandy*, against the owners of the steamship *Mary*, and against the owners of the cargo of the *Mary*, and against all persons interested in the said vessels *Mary* and *Normandy*, or having any right, claim, or interest with reference to or arising out of a collision which occurred on the 17th of March between the said vessels *Normandy* and *Mary*.

The London and South Western Railway Company, the plaintiffs, were the registered owners of the steam vessel *Normandy*. On the 16th of March, 1870, the *Normandy*, laden with a cargo of general merchandise and having passengers on board, left Southampton for Jersey. The next day the *Normandy*, whilst prosecuting her voyage, came into collision with the above-named steam-vessel *Mary*, and sank. In consequence of the said collision the master and many of the passengers and crew on board the *Normandy*, were lost; and the whole of the cargo of the *Normandy* was lost, and the *Mary* and part of her cargo suffered damage. The collision occurred without the actual fault or privity of the plaintiffs. On the 13th of April, 1870, a præcipe for a caveat warrant against the arrest of the *Mary* was filed by the solicitor for the owners of the *Mary*. (1) On the 7th of May a cause of damage (No. 5347) was instituted in this Court against the *Mary* by the London and South Western Railway Company, the plaintiffs in the present suit, for the recovery of damages in respect of the

(1) The præcipe was in the usual form, and contained an undertaking by the solicitor, within three days after he should have been served with a notice of the institution of any cause against the *Mary*, to give bail therein in a sum not exceeding the value of the *Mary*.

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losses sustained by them by reason of the said collision, and an appearance was entered in the said last mentioned suit on behalf of the owners of the *Mary* on the 21st of May. (1) On the said 21st of May a cause of damage (No. 5359) was instituted in this Court against the *Normandy* on behalf of the owners of the *Mary*, and on behalf of the owners of her cargo, for the recovery of damages in respect of the loss sustained by them by reason of the said collision; and on the 30th of May, 1870, an appearance in the said last mentioned suit was entered on behalf of the London and South Western Railway Company, the plaintiffs in the present suit, and the sum of 5000*l.*, the amount in which such suit had been instituted, was paid into court in lieu of bail. Actions at law had been commenced against the said plaintiffs in respect of loss of and damage to goods on board the *Normandy* at the time of the said collision, and the plaintiffs alleged that they had reason to believe that other actions and suits would be brought and instituted against them for the recovery of damages in respect of loss of the lives of persons on board the *Normandy*, and loss of and damage to goods on board the *Normandy*, and goods on board the *Mary*, at the time of the said collision. It was also alleged that the value of the *Normandy* at the time of the said collision, calculated at 15*l.* sterling for every ton of her gross registered tonnage, was insufficient to answer the claims in the said suits or actions instituted and brought, or expected to be instituted or brought against the plaintiffs as aforesaid.

The plaintiffs had not filed any petition in the cause of limitation of liability.

May 31, June 4. *Cohen*, on behalf of the London and South Western Railway Company, the plaintiffs in the suit, moved that the plaintiffs in cause No. 5359, their proctors, solicitors, or agents, and all other persons interested in the *Normandy* or *Mary*, or having any right, title, or interest in respect of the said collision might be restrained from further prosecuting any proceeding now pending in this Court, or in any Court of Common Law, and from commencing or prosecuting any other proceedings against the

(1) Bail was given on behalf of the owners of the *Mary*, in accordance with the undertaking contained in the præcipe for the caveat warrant.

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plaintiffs in respect of the loss or damage caused by the said collision. He stated that his clients were willing to pay into court the 3060*l.*, the value of the *Normandy*, calculated at 15*l.* for each ton of the gross registered tonnage of the vessel, together with interest; and that the application was made before filing petition in order to avoid delay and expense.

E. C. Clarkson, for the owners of the *Mary* and for the owners of her cargo, contended that the Court had no jurisdiction to entertain the cause or to make the order asked for. The Court has no jurisdiction to entertain a suit of limitation of liability, except in cases where the "ship or vessel, or the proceeds thereof, are under arrest" of the Court: The Admiralty Court Act, 1861, s. 13. Neither the *Normandy*, nor the proceeds thereof, are under arrest. Unless the res is in existence and under actual or constructive arrest, proceedings cannot be carred on in rem. The *Normandy* could not be arrested, she is at the bottom of the sea, and the money paid into court by her owners cannot be said to be the proceeds of the vessel. It is true, that in the case of *The Northumbria* (1) it was held that, where bail has been given in order to prevent the arrest of a vessel, this Court has jurisdiction to entertain a suit for limitation of liability. But the present case is different, because the money paid into court, or to be paid into court, cannot be treated as money paid to prevent the arrest of the *Normandy*. Moreover, when money is paid into court it is paid to answer the claim of the plaintiffs in the collision suit only. It is not paid into court to answer the claims of third persons against the *Normandy*. The Court will not exercise its jurisdiction to restrain actions at law, until the plaintiffs in the present suit admit their liability in respect of the collision. Unless the plaintiffs are to blame for the collision, there is no liability to limit: *Hill* v. *Audus*. (2) The principle laid down in *Hill* v. *Audus* (2) applies to the present case, notwithstanding the decision of Dr. Lushington in the case of *The Amalia*. (3) In the *Amalia* all the claimants were persons who had a right to bring actions in this Court, but in the present case the owners of the *Normandy* are domiciled in England, and many of the persons

(1) Ante, p. 24. (2) 1 K. & J. 263; 24 L. J. (Ch.) 229.
(3) Brow. & Lush. 151; 32 L. J. (P. M. & A.) 191.

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preferring claims against them for damage to cargo cannot sue the *Normandy* in this Court. How is the question of the liability of the owners of the *Normandy* in these cases to be determined, if before the liability of the *Normandy* is admitted, the proceedings at Common Law are stayed? The actions at Common Law are actions brought against the present plaintiffs as common carriers for breach of their contract to carry, and this Court cannot interfere with those actions.

Cohen, in reply. The plaintiffs are willing that the collision suit in this Court, numbered 5359, should be proceeded with, in order to determine the question of liability, and the plaintiffs are willing to undertake, that if the Court should in that suit find the *Normandy* solely to blame, or find the *Normandy* and the *Mary* to blame for the collision, the plaintiffs will, in the other actions and suits, admit their liability to such plaintiffs as may prove their title to sue. It is contended, on the authority of the *Northumbria*, that the Court has the same jurisdiction in this case as it would have if the *Normandy* were under the arrest of the Court. The owners of the *Mary* having filed a præcipe for a caveat warrant, and given security in pursuance thereof, it is clear that the *Mary* must be considered as under the arrest of the Court. The provisions of the 34th section of the Admiralty Jurisdiction Act, 1861, shew that it is the intention of the legislature, that in all cases where cross causes of damage are instituted and one of the ships only is under arrest, that the Court should have power to require security to be given for the other ship; and wherever the Court has power to compel security to be given for the res, it has the same jurisdiction as if the res were actually under arrest. The objection that the actions pending at Common Law are actions of a nature which the Court has not jurisdiction to restrain, is not an objection which can be properly urged at the present stage of the proceedings. The present plaintiffs will be content if the Court will grant an order in the very terms of the 514th section of the Merchant Shipping Act, 1854, to stop all actions "pending in any other Court in relation to the same subject matter." If the present plaintiffs serve the order upon plaintiffs in actions which the Court has no power to stay, the persons aggrieved may then come to the Court for relief.

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SIR ROBERT PHILLIMORE. This is an application to the Court to exercise the power conferred upon it by the 13th section of the Admiralty Court Act, 1861. Various objections have been taken by the owners of the *Mary*. It is contended by them that as the *Normandy* was sunk in the collision, and could not be arrested, the Court has no jurisdiction to grant the relief asked for. I should be sorry to allow such an objection to prevail, and when the words of the 13th section of the Admiralty Court Act, 1861, are carefully considered in connection with the 34th section of the same Act, and the state of the law prior to the time of the passing of the Act, I think it may be gathered that it was the intention of the legislature to confer upon this Court jurisdiction to entertain a cause of limitation of liability in all cases where the jurisdiction of the Court over the principal question of damage was well founded. In the case of *The Northumbria* (1), where a præcipe for a caveat warrant had been filed by the owners of the vessel in order to prevent her arrest, and they had given bail, in pursuance of the undertaking contained in the præcipe, I held that the vessel was constructively under the arrest of the Court. In the present case, I am asked to go a step further. No præcipe for a caveat warrant has been filed by the owners of the *Normandy*, and the *Normandy* has not been, and could not have been, arrested. But although I cannot consider the question free from doubt, after careful consideration I have arrived at the opinion that I ought to entertain the present application. The jurisdiction of the Court over the principal question of damage is well founded, and that, I think, is sufficient to give me jurisdiction to entertain the suit of limitation of liability.

In the case of *Hill* v. *Audus* (2), which was decided in 1855, Lord Hatherley, who was then Vice-Chancellor, held that the Court of Chancery having no jurisdiction over the principal question of damage could not entertain a suit of limitation of liability unless the liability were admitted. But my learned predecessor, in the case of *The Amalia* (3), decided in the year 1863, that the rule laid down in the case of *Hill* v. *Audus* (2) did not apply to suits of limitation of liability instituted in this Court, because this Court has

(1) Ante, p. 24.
(2) 1 K. & J. 263; 24 L. J. (Ch.) 229.
(3) Brow. & Lush. 151; 32 L. J. P. M. & A. 191.

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jurisdiction to decide the principal question of damage. I am certainly not disposed to question the propriety of the decision in the case of *The Amalia*. (1) It is true that in the case of *The Amalia* (1) this Court was not asked to stay actions pending in any other Court, and I learn from the Registrar that now for the first time the Court is asked to stay actions pending in the Courts of Common Law. But if this Court has jurisdiction to entertain the suit of limitation of liability, I think there can be little doubt that it has power to stop all actions relating to the same subject-matter wherever pending, for the 514th section of the Merchant Shipping Act, 1854, expressly refers to actions "pending in any other Court."

In the course of the argument there has been considerable discussion about the terms upon which I should grant the relief asked. The plaintiffs offer to pay into court the full value of the *Normandy*, calculated at 15*l.* per ton and interest. They also undertake if, on the hearing of the collision suits, the Court should find the *Normandy* to blame, that they will admit their liability in the other actions. Upon these conditions I shall make an order to stay all actions and suits pending in any other Court relating to the subject-matter. The terms of the order must be carefully considered. The plaintiffs must file their petition in this cause within three days.

The order was drawn up in the following form :—

NORMANDY (5366).

The judge having heard counsel for the plaintiffs and the several defendants, ordered that all actions and suits pending in any other court in relation to the subject-matter in the suit, to wit, the liability of the owners of the vessel *Normandy*, the plaintiffs in this suit, in respect of loss of life, or personal injury, or loss or damage to ships, goods, merchandize, or other things, on the occasion of a collision which occurred on or about the 17th day of March, 1870, between the said vessel *Normandy* and a vessel called the *Mary*, be stopped, the plaintiffs by their counsel undertaking to admit their liability in all such actions and suits as soon as this Court shall have pronounced for the damage proceeded for in the cause pending in this Court entitled *The Normandy* (5359), or for a moiety of such damage.

The order was served upon several persons plaintiffs in actions pending against the London and South Western Railway Company, and, amongst others, upon the plaintiffs in an action pending

(1) Brow. & Lush. 151; 32 L. J. (P. M. & A.) 191.

in the Court of Exchequer, entitled *Milburne and Others* v. *The London and South Western Ry. Co.*

July 12. The Court was moved, on behalf of Milburne and others, the plaintiffs in the last-mentioned action, to direct that the said order might be dissolved so far as it affected them. It appeared from affidavits filed in support of the application that the action in the Exchequer was brought by the said Milburne and others to recover the value of goods which had been delivered to the London and South Western Railway Company at their receiving office in Aldersgate Street, in the city of London, and had been received by them, to be carried by them for reward from London to Jersey without any special stipulation limiting their liability as carriers. The goods had been shipped by the London and South Western Railway Company on board the *Normandy* without the knowledge or privity of the said Milburne and others.

W. Willis, in support of the application, contended that the action at law was founded upon a contract entered into with the London and South Western Railway Company, as common carriers, to carry from London to Jersey. The goods were to be carried part of the way by land. The contract was made with the company as land carriers. When the company accepted the goods, they accepted the liability of common carriers, and they cannot rid themselves of that liability by shipping the goods on board one of their own vessels without the knowledge of the owner of the goods. The contract to carry was one entire contract, and the company remained liable as common carriers while the goods were in course of transit, whether they were being carried on land or by sea: *Zunz* v. *The South Eastern Ry. Co.* (1) Had the goods been shipped on board a ship owned by third persons, it is clear that the liability of the company for the goods would have been the ordinary liability of common carriers, and the company cannot limit that liability by shipping the goods on board their own vessel without the knowledge of the person with whom they have contracted. The action at common law in no way relates to the liability of the company as shipowners. Questions of an entirely different nature are

(1) Law Rep. 4 Q. B. 539.

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there raised, and this Court ought not to interfere to prevent Milburne and others suing at law upon their contract with the company.

H. H. Shephard, for the London and South Western Railway Company, the plaintiffs in the suit for limitation of liability. The 54th section of the Merchant Shipping Act Amendment Act, 1862, is very wide in its terms, and applies to the present case. If this section is not to be enforced against Milburne and Co., the same argument will avail to limit the effect of the 503rd section of the Merchant Shipping Act, 1854, which exempts the owners of ships from liability for loss in case of damage by fire, and in certain cases from the loss of gold, silver, and such like. It may very well be that the liability of the company during the time the goods were on board ship was limited by provisions which did not apply while the goods were being carried by land: *Le Conteur* v. *London and South Western Ry. Co.* (1)

Willis, in reply.

SIR ROBERT PHILLIMORE. I am satisfied I ought not to dissolve the injunction. I reject the motion, but without costs. (2)

Proctors for the owners of the *Normandy*: *Clarkson, Son, & Greenwell.*

Solicitor for the owners of the *Mary*: *Cooper.*

Solicitor for Milburne and others: *Mardon.*

(1) Law Rep. 1 Q. B. 54.

(2) On the 12th and 13th of July the collision suit (5359) was heard. The Court pronounced the *Normandy* solely to blame.

THE CLARA KILLAM.

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August 2.

Jurisdiction—"Damage done by any Ship"—The Admiralty Court Act, 1861 (24 *Vict. c.* 10), *s.* 7—*Damage to Telegraph Cable.*

A ship cast anchor near the South Foreland. Her anchor got foul of a submarine telegraph cable. The crew heaved up the anchor to the water's edge, and the telegraph cable came up entangled with it. In order to free the anchor from the telegraph cable the mate of the ship, acting under the direction of the master, cut the telegraph cable in two with a hatchet. By the exercise of ordinary nautical skill the anchor might have been freed from the cable by the crew, without cutting the cable:—

Held, that the Court had jurisdiction to entertain an action instituted by the owners of the telegraph cable against the ship for the damage done to the cable, and that the owners of the telegraph cable were entitled to judgment in the action.

Port 305 — 5 PC 145

THIS was a suit instituted on behalf of the responsible managers or gérants responsables of The Submarine Telegraph Company between France and England against the ship *Clara Killam*, her tackle, apparel and furniture, and the freight due for the transportation of the cargo lately laden therein.

The petition alleged in substance as follows:—

The plaintiffs are the responsible managers or gérants responsables of the Submarine Telegraph Company between France and England, and in such capacity are possessed of a certain telegraph cable, used for the purpose of transmitting messages between Dover in England and Calais in France, by means of electricity, and the said telegraph cable was, on the 21st of March, 1869, lawfully, and by and with the consent of, and license of Her Majesty Queen Victoria, lying on the bed of the high seas near the said port of Dover, that is to say, within three marine miles of the sea-shore and coast of Kent, in the county of Kent, in England.

The said ship, *Clara Killam*, belonging to the port of Yarmouth, in Nova Scotia, cleared from Gravesend on the 15th of March, 1869, on a voyage to Boston in North America, and arrived in the Downs on Wednesday, the 17th of March. The weather then became threatening, and shortly afterwards commenced to blow a gale, and the vessel began to drive, and continued to drive until 4 A.M. on Saturday, the 20th of March, when she was

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brought up about abreast the South Foreland. At 4 A.M. on Sunday, the 21st of March, the weather having moderated and the wind being N.E., the crew of the *Clara Killam*, under the direction of the master, commenced to weigh the anchors of the said vessel, and having got one anchor up, tried to get the other up with the assistance of all the crew. About 1 P.M. they got the anchor up to the bow of the ship, with the telegraph cable lying across the anchor stock, but which was only kept from slipping off the anchor by one of the iron bands fixed round the stock. The telegraph cable, with ordinary care and proper management, might have easily been got clear of the anchor without any damage being done to the cable or anchor; but the master on seeing the cable lying over the anchor stock, ordered the mate to go over the bows of the vessel and to cut the cable, and the mate upon receiving such orders went over the bows of the vessel and commenced to cut the cable with a hatchet, and after cutting and hacking at the cable, with the sanction and under the direction of the master, for about three-quarters of an hour he succeeded in severing the telegraph cable in two, thereby doing much damage to the telegraph cable.

The aforesaid damage done to the telegraph cable, and the loss consequent thereupon, was solely and entirely caused by the improper conduct and by the want of care and of proper management on the part of the master of the ship.

The answer of the defendants, the owners of the ship, contained, inter alia, the following allegations :—

"This Honourable Court has not jurisdiction to entertain this suit.

"At about 5 A.M. on the 21st of March, the crew of the *Clara Killam* commenced heaving in her chains, and continued so doing until about 11 A.M., by which time they succeeded in heaving up both her anchors, but as the *Clara Killam* still rode, it was concluded that the anchors of the *Clara Killam* were foul of something.

"The anchors of the *Clara Killam* were, with great labour and difficulty, got to the water's edge, and it was then found that both the anchors of the *Clara Killam* had become and were entangled with the cable mentioned in the petition, in such a manner as to

render it impossible to extricate the same therefrom before the lapse of a considerable time, save by severing the cable. The cable was then already stranded and injured at the part of it with which the anchors of the *Clara Killam* were entangled, and the weight and strain of the *Clara Killam* on it was further damaging it, and before it would have been possible to have disentangled it from the anchors further damage would have been done to the cable, and it would most probably have parted, and in the meantime the *Clara Killam* herself was lying exposed to danger; and, under the circumstances, the master of the *Clara Killam*, acting reasonably and justifiably, caused the cable to be severed, and it was thereby cleared from the anchors.

"Before the cable was severed, as aforesaid, it had received such an amount of injury as would have necessitated its being raised and repaired, and renewed, and by the act of severing the cable no damage was occasioned to the plaintiffs or the owners of the cable.

"The injury to the cable was the result of inevitable accident."

Huddleston, Q.C., Dr. Spinks, Q.C., Butt, Q.C., and *Dr. Tristram*, for the plaintiffs.

Milward, Q.C., and *E. C. Clarkson*, for the defendants.

The evidence in the cause was taken vivâ voce in open court. The hearing commenced on the 30th of March, 1870, and was continued on the 26th of April and the 27th of July. The substance of the evidence appears from the judgment. At the conclusion of the evidence,

Butt, Q.C., addressed the Court. He cited *The Submarine Telegraph Co.* v. *Dickson.* (1)

Milward, Q.C., contended that the Court had not jurisdiction to entertain the suit. If the Court has jurisdiction, it is by virtue of the provisions of the 7th section of the Admiralty Court Act, 1861, which confers jurisdiction "over any claim for damage done by any ship." But in the present case the damage done to the cable was not damage done by the ship.

Butt, Q.C., in reply. A ship is an inanimate thing, and cannot do damage of itself. Damage done by a ship must mean damage

(1) 15 C. B. (N. S.) 759; 33 L. J. (C.P.) 139.

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done by those who navigate the ship. The injury to the cable was done in the course of the navigation of the ship by those who were employed by the owners to navigate her, and that is sufficient to give the Court jurisdiction.

Cur. adv. vult.

Aug. 2. SIR ROBERT PHILLIMORE. This is a suit instituted by the managers of the Submarine Telegraph Company between England and France against the ship *Clara Killam*, to obtain compensation for the injury done by those on board her to the telegraph cable.

The *Clara Killam*, a vessel of 838 tons register, with a crew of seventeen hands all told, sailed from London on the 16th of March, 1869, laden with a general cargo bound for Boston, in America.

She arrived on the 19th in the Downs; the weather became very bad, and she bore up off Old Stairs Bay, where she remained till 4 P.M. of the next day, when the wind blew heavily from the W., and she began to drive. She was brought up with difficulty to the S. of the Deal Bank buoy, when it was discovered that the port anchor was gone. A spare anchor of smaller size was then bent on the port chain, and some time afterwards let go. The wind flew to the N.E., and the vessel drove in the direction of the Varne Sands; but was brought up about 9 A.M. of the next day. Early in the next morning, between 3 and 4, the crew began to heave on both anchors, using their utmost exertions, but found an extraordinary strain upon the anchors, and it was not until nearly 11 o'clock that they succeeded in bringing the anchors to the water's edge. It was then discovered that one, if not both of the anchors (upon this point there may be some doubt), had become entangled with the telegraph cable, a circumstance which would appear to have preserved the vessel from destruction, inasmuch as it had prevented her from driving on the sands.

Up to this point, in the history of this case, no charge is preferred against the defendants, no blame is ascribed to the *Clara Killam* for improperly fouling the telegraph cable. The course which in these circumstances the captain (having consulted, it is said, with the mate) ordered to be pursued was as follows: the mate, having put a bow line round him, was lowered down into the

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sea, his feet rested upon the starboard anchor's stock, and sometimes he was quite under water; in this condition he chopped, with an axe, at the telegraph cable for about fifteen minutes or more.

The cable was by this means cut in two; and the ship, the wind being then favourable, proceeded immediately on her voyage to America. For this damage, so inflicted, the present action is brought, and as it is the first of the kind submitted to the jurisdiction of this Court, I thought it expedient to take a little time to examine the principles of law applicable to these novel circumstances, and I have derived assistance, in the execution of this task, from a perusal of the judgment of the Court of Common Pleas, delivered in 1864, in the case of *The Submarine Telegraph Company* v. *Dickson*. (1)

I must consider that this telegraph cable was lawfully placed at the bottom of the sea, and in the spot where it received the injury. I must also consider that the vessel which did the injury to it was in the exercise of her right both in navigating the surface of the sea, and in dropping her anchors where and when she had let them go. The law requires that each party should exercise his right so as, if possible, to avoid a conflict with the right of the other. It was the duty, therefore, of the ship to disentangle, if possible, her anchor from the cable without injuring it. She was bound to apply ordinary skill, and to take the time necessary for this purpose, unless she thereby exposed herself to present or imminent peril—the suggestion in the ninth paragraph of the answer, that it was impossible to extricate her anchors "before the lapse of a considerable time, save by severing the said cable," cannot be admitted as a justification of the act. It has been contended that the cable when brought up was in so injured a condition as to render the cutting of it practically immaterial. I should be disposed to admit this defence if it were supported by the evidence. But I am satisfied that it is not; but that, on the contrary, both the oral evidence, and that derived from an inspection of the parts of the cable produced in court, prove that the copper wire in the centre, through which the fluid passes, was wholly unimpaired; the insulating material was not rubbed off, though one of the protecting wires had been injured, but all these wires might have been removed without

(1) 15 C. B. (N. S.) 759; 33 L. J. (C.P.) 139.

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destroying the working property of the electric wire, which would remain still defended by the gutta percha, and the yarn, or tow. The cable, though not a deep-sea cable, was a very strong one, and the injury done to it, apart from that caused by the cutting with the axe, was very trivial.

The elder brethren of the Trinity House advise me that, by ordinary nautical skill, the damage to the wire might have been avoided, and the anchor or anchors extricated. If a slip rope had been passed under the telegraph cable, and hove taut, the anchor might have been easily cleared, the slip rope then let go, and the cable dropped in its place; if both anchors were entangled the same course should have been adopted as to both. The ship has not the excuse of present or imminent danger to allege—the facts show that she was under no pressure of this kind—reasonable skill, patience, and labour, would have been sufficient to extricate the anchor, without cutting the cable, an expedient which, in my judgment, assisted by that of my assessors, was recklessly and wrongfully had recourse to.

The technical objection that this suit is instituted in rem and not in personam, and that the ship herself did not do the damage, but those on board of her, is untenable.

I pronounce the *Clara Killam* to blame for the injury done to the wire, the property of the Submarine Telegraph Company, and condemn her in damages and costs, and make the usual order of reference to the registrar.

Solicitors for plaintiffs: *Davies, Son, Campbell, & Reeves.*
Solicitor for defendants: *Cooper.*

THE OFFICE OF THE JUDGE PROMOTED BY SHEPPARD *v.* BENNETT. 1870

July 20.

The Doctrine of the Real Presence—Adoration of the Consecrated Elements—Practice—Duty of Promoter to proceed with Reasonable Expedition.

It is not contrary to law for a minister of the church to affirm or promulgate the doctrine that there is an actual and real presence, external to the act of the communicant, in the elements consecrated in the administration of the Sacrament of the Holy Communion.

It is unlawful for a minister of the Church to teach:—

That there is a visible presence of our Lord upon the altar at the celebration of the Holy Communion.

That adoration is due to the consecrated elements.

It is the duty of the promoter of a criminal suit to prosecute the suit with reasonable expedition. If he neglects to do so, the Court may dismiss the suit.

IN this case the office of the judge was promoted by virtue of letters of request from the late Bishop of Bath and Wells.

The defendant was a clerk in holy orders, and vicar of Frome Selwood, in the diocese of Bath and Wells.

The admission of the articles was moved on the 26th of October, 1869, and on the 30th of that month the Court decided that certain passages in the articles were inadmissible, and directed the articles to be reformed. Against this decision the promoter appealed to the Judicial Committee of the Privy Council, who, on the 26th of March, 1870, affirmed the decision. The articles were reformed accordingly.

The following are the material parts of the reformed articles:—

3. That you, the said William James Early Bennett, have, within two years last past, written and printed, published, dispersed, given, sold, and set forth, or caused to be printed, published, dispersed, given, sold, and set forth, within the diocese of London, in a book entitled "The Church and the World," a certain article, essay, or review, entitled "Some Results of the Tractarian Movement of 1833," the said article, essay, or review commencing at the first page of the said book, and continuing from that to the twenty-sixth page, inclusive, and which said book is deposited in the registry of the Consistorial and Episcopal Court of London as hereinafter more particularly mentioned.

4. That you, the said William James Early Bennett, have,

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within two years last past, written and printed, published, dispersed, given, sold, and set forth, or caused to be printed, published, dispersed, given, sold, and set forth, within the diocese of London, a certain book, pamphlet, or letter, entitled "A Plea for Toleration in the Church of England, in a Letter to the Rev. E. B. Pusey, D.D., Regius Professor of Hebrew, and Canon of Christ Church, Oxford, 2nd ed.;" also a certain book, pamphlet, or letter, entitled "A Plea for Toleration in the Church of England, in a Letter to the Rev. E. B. Pusey, D.D., Regius Professor of Hebrew, and Canon of Christ Church, Oxford, 3rd ed.;" which said two several books, pamphlets, or letters are deposited in the registry of the Consistorial and Episcopal Court of London as hereinafter more particularly mentioned.

5. That in the said article, essay, or review, entitled "Some Results of the Tractarian Movement of 1833" (referred to in the third preceding article), are contained the following passages, that is to say:—

at pages 8 and 9:—

(A.) The real question as to the success of any work must be determined by its ultimate, not by its immediate results; by its generally pervading character, not by local or temporary failures. We must compare the position of the Church as she was before the year 1833, not with those unhappy periods when a momentary pressure was laid upon her, such as that of the Durham Letter, the Jerusalem Bishopric, or the Gorham Judgment, at all which periods the weak and the unstable fell to the ground bewildered; but we must compare 1833 with 1867. We must look at the doctrines as *then* maintained with those *now* maintained, and that *generally*: we must look at the character and lives of the clergy, at the hold which the Church has upon the poor; we must look, not at her episcopal representation in the House of Lords, but at her sacerdotal representation at her altars, and her doctrinal representation in her pulpits and her schools. When we have done this, but not till then, shall we be able to say what have been the results of the "Tracts for the Times."

at page 10:—

(B.) *The Doctrine of the Holy Eucharist.*—Two questions are here involved, the doctrine of sacrifice and of the real presence. Dr. Newman tells us, in his "Apologia," "when a correspondent, in good faith, wrote to a newspaper to say that the *sacrifice* of the Holy Eucharist spoken of in the tract was a false print for *Sacrament*, I thought the mistake too pleasant to be corrected before I was asked about it." This may be a fair representation of the doctrine held by the general average of the bishops and clergy at that time; and of course, therefore, in *the world* any idea of a sacrifice in the Blessed Eucharist would have been a chimera. An act of memorial—an Agape or Love Feast, a solemn record of Jesus' passion

and death—that would have been the sum total of the general idea of the Holy Eucharist in those days.

at pages 11 and 12 :—

(C.) When Dr. Pusey, in 1843, put forth his remarkable sermon entitled "Holy Communion, a Comfort for the Penitent," the world was startled. Yes, and much more than the world; the learned University itself was startled. The sermon stated, "The same reality of the divine gift makes it angel's food to the saint, and a ransom to the sinner. And both because it is the body and blood of Christ. Were it *only* a thankful commemoration of his redeeming love, or *only* a shewing forth of his death, or *only* a strengthening and refreshing of the soul, it were indeed a reasonable service, but it could have no direct healing to the sinner. To him its special joy is, that it is his Redeemer's very broken body; it is his blood which was shed for the remission of his sins. In the words of the ancient Church, 'he drinks his ransom,' he eateth 'the very body and blood of the Lord, the only sacrifice for sin.' God poureth out for him 'the most precious blood of his only begotten; they are fed from the Cross of the Lord,' 'because they eat his body and blood.' For this doctrine, this holy comforting doctrine, this true catholic doctrine—who would believe it now?—our dear friend was absolutely condemned by the University of Oxford and suspended for two years. But, patience! The learned University of Oxford had to learn as well as the rest of the world—it condemned because it was ignorant—time advanced—the same Doctor preached again when his suspension was over, and reiterated the condemned doctrine. Ten years had passed, and the same sermon was continued as though nothing had intervened, and *then* the doctrine was received. How dignified, how grand, how noble was that patient waiting for the teaching of time! The second sermon is entitled "The Presence of Christ in the Holy Eucharist." The sermon states, "The presence of which our Lord speaks has been termed sacramental, supernatural, mystical, ineffable, opposed not to what is real but to what is natural. It is a presence without us, not within us only: a presence by virtue of our Lord's words, although to us it becomes a saving presence, received to our salvation through our faith. . . . . The word body is no figure. For our Lord says, 'This is my body;' and not so only, but 'This is my body which is given for you.' Since then it was his true body which was given *for* us on the Cross, it is his true body which is given *to* us in the sacrament. The manner of the presence of the body is different. The body which is present is the same; for He has said 'This is my body which is given for you.'"

at pages 12 and 13 :—

(D.) The priest or priest and deacon formerly standing with faces opposite each other, and leaning over the altar in apparently amicable conference, now appear in their sacerdotal position, as though they were in reality occupied in the great sacrifice which it is their office to offer. Formerly, an ordinary surplice, and frequently not over clean or seemly, covered the person of the ministering priest, no difference being manifested between that and all other offerings of prayer; now the ancient vestments present to crowds of worshippers the fact, that here before God's altar is something far higher, far more awful, more mysterious, than aught that man can speak of, namely, the presence of the Son of God in human flesh subsisting. And towards this are tending all the ancient

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rites of the Church which are now in course of restoration. The solemn music and the smoke of the incense go up before God, assuring the world that here is no appearance only of love, but a reality and a depth which human hearts cannot fathom, nor even the angels themselves. The incense is the mediation of Jesus ascending from the altar to plead for the sins of man.

6. That in the said book, pamphlet, or letter, entitled, "A Plea for Toleration in the Church of England, in a Letter to the Rev. E. B. Pusey, D.D., Regius Professor of Hebrew and Canon of Christ Church, Oxford, 2nd ed.," referred to in the fourth preceding article, are contained in the following passages, that is to say:—

at pages 2 and 3:—

(E.) The greater part of the priesthood does now maintain and set forth without flinching those doctrines which were then (that is in the year 1830) to say the least, held in abeyance. To speak only of myself, I have worked steadily onwards as far as my humble powers have enabled me, cheered and instructed by the "Tracts for the Times," and your own (that is to say the said Rev. E. B. Pusey's) more special teaching in Oxford to "*contend earnestly for the faith once delivered unto the saints*"—that faith seeming to me to derive its whole efficacy from a right appreciation, primarily of the doctrine of the Incarnation, and depending on that, the real, actual, and visible presence of our Lord upon the altars of our churches. Without that doctrine as containing and inferring the sacerdotal office of the priest and the sacrificial character of the altar, there would seem to me no Church at all. It could not but be that *somehow* the words of our blessed Lord must be true—"*Except ye eat the flesh of the Son of Man and drink his blood ye have no life in you.*"

at pages 4 and 5:—

(F.) In proportion as the doctrines of the real presence and eucharistic sacrifice have found their way into the faith of congregations, so have ceremonial observances increased, and have become more and more acceptable. That which I taught first in 1842 I have naturally followed up when the opportunity came; and it is now my happiness to say that I have been enabled, with God's blessing, to realize many things in the dignified observance of the blessed sacrament which I then only dreamed of as possible. I have been enabled to revive the ancient catholic vestments, and to use, together with them, many beautiful ceremonies, which, though of late years fallen into desuetude, always formed a part of the service of the eucharist in olden times.

at page 5:—

(G.) Our eucharistic office, instead of being, as in too many instances it used to be, mutilated, and curtailed of its fair proportions, and very often a mere dead piece of formalism, has become a living, real, spiritual offering of Jesus Christ upon the altar."

at page 14:—

(H.) Well, I do not know what others of my brethren in the priesthood may

think—I do not wish to compromise them by anything that I say or do—but seeing that I am one of those who burn lighted candles at the altar in the daytime; who use incense at the Holy Sacrifice; who use the eucharistic vestments; who elevate the Blessed Sacrament; who myself adore, and teach the people to adore, the consecrated elements, believing Christ to be in them; believing that under their veil is the sacred body and blood of my Lord and Saviour Jesus Christ; seeing all this, it may be conceived that I cannot rest very much at ease under the imputations above recited.

at page 15:—

(I.) Is it really the case that the Church of Rome is the only communion in which men may hold the doctrines of the real presence and the eucharistic sacrifice, and be in proportion reverential in their devotions and adore God in that blessed offering? Is the Church of England to stand aloof and be singular in the aspect of a dead intellectual monotony, excluding all that has faith, passion, love, or feeling in her devotions?

at page 63:—

(K.) It is not for a chasuble or a cope, lighted tapers or the smoke of incense, the mitre or the pastoral staff, that we are contending; but, as all those who think deeply on either side of the question know full well, *for the doctrines which lie hidden under them.* No one of the commonest capacity would either undergo the trouble or encounter the expense which is unavoidably connected with the proper observance of religious ceremonies, if it were only for the external show which was to be gained in them.

at pages 63, 64, and 65:—

(L.) The Church of England, as all catholic churches, is agreed upon this, and, therefore, the Bishop of London, though he may not be so just, is still in his generation the wiser (if he desire at once to go to the root of the matter) not to heed the ritual but plunge at once into the doctrine. Let us ascertain, then, what the doctrine is which is brought into question. It is threefold: 1. The real objective presence of our Blessed Lord. 2. The sacrifice offered by the priest; and, 3. The adoration due to the presence of our Blessed Lord in the Holy Eucharist. Here it is that the Bishop of London fastens upon us without mercy. There is no subterfuge or circumlocution in him (for which I honour him). We are guilty, in his opinion, of holding and teaching false doctrine, and he says so. But, with all due deference to him, it does not follow that because he condemns us of false doctrine therefore we are guilty. As it always was, so it is now in the Church of Christ. We have an appeal: a bishop may be himself heretical in charging others with heresy. Church history furnishes abundance of examples. S. Athanasius came forth victorious in the truth, though Arius had the upper hand by law and by force for many years. And in this particular question it may be asked of him, why it is that now, after so many trials, the doctrines of the Holy Eucharist are again set forth as matters of agitation, and those who hold the Catholic faith denounced afresh as though they held something new and strange, when every one knows they have been determined by the Church long ago. It is not as if these doctrines now appeared for the first time in Church history. They are the first principles of the oracles of God, and it seems hard to be thus compelled to lay

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their foundation over and over again. You yourself (meaning thereby the Rev. E. B. Pusey), my dear friend, have in these latter days made them amply known, and have claimed them as the indisputable heritage of the Church. When, first in the "Tracts for the Times" and then in your University and other sermons, you were challenged by the world, you proved them to be our doctrine. When you preached, in 1843, on "Comfort to the Penitent in the Holy Eucharist," you were suspended by the University. When you preached the same doctrine, only much more strongly, in 1853, the University, by its then silence, showed that it was able to accept what you taught, and there was no more question concerning it; ten years had cleared away the misunderstanding of your first statement, and the Church dwelt confidently in the strength of her faith, now no longer gainsaid.

7. That in the said book, pamphlet, or letter, entitled "A Plea for Toleration in the Church of England, in a Letter to the Reverend E. B. Pusey, D.D., Regius Professor of Hebrew, and Canon of Christ Church, Oxford, 3rd ed.," also referred to in the said fourth preceding article, are contained the following passages, that is to say:—

at pages 3 and 4 of the preface:—

(N.) I therefore send forth this third edition with as little comment as possible, and in precisely the same language as that which was used in the first and second editions, save and except the two passages referred to, omitting also the postscript, which, by the events in the Church which have occurred in the interval, has now no bearing on the subject. The reader will observe that in the two first editions, at page 3, the words were:—"*The real actual and visible presence of our Lord upon the altars of our churches.*" In the present edition he will find at page 2 the following words substituted:—"*The real and actual presence of our Lord under the form of bread and wine upon the altars of our churches.*" He will also observe that at page 14, in the former editions, the words were:—"*Who myself adore and teach the people to adore the consecrated elements, believing Christ to be in them—believing that under their veil is the sacred body and blood of my Lord and Saviour Jesus Christ.*" He will now find the following words substituted:—"*Who myself adore and teach the people to adore Christ present in the sacrament, under the form of bread and wine, believing that under their veil is the sacred body and blood of my Lord and Saviour Jesus Christ.*" My meaning, and that which passed through my mind in writing the original passages, was precisely the same as that which is now conveyed in the words substituted, but as the original words were liable to a different construction from that in which I used them, I therefore most willingly in this edition adopt another formula to express my meaning. The formula now adopted, and which, without any doubt, will convey the doctrine of the real presence, as the Church would teach it, has been suggested to me by him whose name stands at the head of this pamphlet (that is to say, the said Rev. E. B. Pusey, D.D.); one to whom the whole Church would implicitly bow and all revere. I have no hesitation in adopting his words as my own fully and completely, and on this basis am ready with him patiently to contend for the faith once delivered to the saints, and if need be gladly to suffer.

at page 6 of the said preface:—

(O.) The three great doctrines on which the Catholic Church has to take her stand are these:—1. The real objective presence of our blessed Lord in the eucharist. 2. The sacrifice offered by the priest; and, 3. The adoration due to the presence of our blessed Lord therein.

at page 2 of the said book:—

(P.) The greater part of the priesthood does now maintain and set forth, without flinching, those doctrines, which were then, to say the least, held in abeyance. To speak only of myself, I have worked steadily onwards, as far as my humble powers have enabled me, cheered and instructed by the "Tracts for the Times," and your own more special teaching in Oxford, to "*contend earnestly for the faith once delivered unto the saints*"—that faith seeming to me to derive its whole efficacy from a right appreciation primarily of the doctrine of the incarnation, and depending on that, the real and actual presence of our Lord, under the form of bread and wine, upon the altars of our churches. Without that doctrine, as containing and inferring the sacerdotal office of the priest, and the sacrificial character of the altar, there would seem to me no church at all. It could not but be that *somehow* the words of our blessed Lord must be true:—"*Except ye eat the flesh of the Son of Man, and drink his blood, ye have no life in you.*"

at pages 3 and 4:—

(Q.) [A copy of the passage set out in the 6th Article, lettered F., see ante, p. 170.]

at page 4:—

(R.) [A copy of the passage set out in the 6th Article, lettered G., see ante, p. 170.]

at page 11:—

(S.) Well, I do not know what others of my brethren in the priesthood may think—I do not wish to compromise them by anything that I say or do—but seeing that I am one of those who burn lighted candles at the altar in the daytime; who use incense at the Holy Sacrifice; who use the eucharistic vestments; who elevate the Blessed Sacrament; who myself adore, and teach the people to adore, Christ present in the sacrament, under the form of bread and wine; believing that under their veil is the sacred body and blood of my Lord and Saviour Jesus Christ;—seeing all this, it may be conceived that I cannot rest very much at ease under the imputations above recited.

at page 12:—

(T.) [A copy of the passage set out in the 6th Article, lettered I., see ante, p. 171.]

at page 49:—

(U.) [A copy of the passage set out in the 6th Article, lettered K., see ante, p. 171.]

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at pages 49, 50, and 51:—

(V.) [A copy of the passage set out in the 6th Article, lettered L., see ante, p. 171.]

8. That in or by the passages hereinbefore set forth in the fifth preceding article, you have maintained or affirmed and promulgated the doctrine that in the sacrament of the Lord's Supper there is an actual presence of the body and blood of our Lord in the consecrated bread and wine.

9. That in or by the passages hereinbefore set forth in the fifth preceding article, you have maintained or affirmed and promulgated the doctrine that there is an actual presence of the true body and blood of our Lord in the sacramental bread and wine, without or external to the communicant, by virtue of, upon and after the consecration of the same, irrespectively of the faith and worthiness of the communicant, so as to be received by all communicants irrespectively of their faith and worthiness.

10. That in or by the passages hereinbefore set forth in the fifth preceding article, you have maintained or affirmed and promulgated the doctrine that there is an actual presence of the true body and blood of our Lord in the consecrated bread and wine, without or external to the communicants prior to and separate from the act of reception by the communicants.

11. That in or by the passages hereinbefore set forth in the fifth preceding article, you have maintained or affirmed and promulgated the doctrine that in the holy communion the natural body and blood of our Saviour Christ are not only in heaven, but here, to wit, upon or before the altars (thereby referring to the communion tables) of the churches of the said United Church of England and Ireland, under the form of bread and wine.

13. That in or by the passages hereinbefore set forth in the fifth preceding article, you have maintained or affirmed and promulgated the position that the holy communion table is an altar of sacrifice, at which the ministering priests of the said United Church of England and Ireland appear in a sacerdotal position at the celebration of the holy communion, and that at such celebration there is a great sacrifice or offering of Jesus Christ by the ministering priest, and that in such sacrifice or offering the mediation of Jesus ascends from such altar to plead for the sins of men.

14. That in or by the passages hereinbefore set forth in the sixth preceding article, you have maintained or affirmed and promulgated the doctrine that in the sacrament of the Lord's Supper there is an actual presence of the body and blood of our Lord in the consecrated bread and wine.

15. That in or by the passages hereinbefore set forth in the sixth preceding article, you have maintained or affirmed and promulgated the doctrine that the true body and blood of our Lord are actually and visibly present upon the altars (thereby referring to the communion tables) of the churches of the said United Church of England and Ireland under the form or veil of, and in the sacramental bread and wine, by virtue of, upon, and after the consecration of the same, irrespectively of the faith and worthiness of the communicant, so as to be received by all communicants irrespectively of their faith and worthiness.

16. That in or by the passages hereinbefore set forth in the sixth preceding article, you have maintained or affirmed and promulgated the doctrine that the true body and blood of our Lord are actually and visibly present upon the altars (thereby referring to the communion tables) of the churches of the said United Church of England and Ireland under the form or veil of, and in the consecrated bread and wine, prior to, and separately from, the act of the reception by the communicants.

17. That in or by the passages hereinbefore set forth in the sixth preceding article, you have maintained or affirmed and promulgated the doctrine that in the holy communion the natural body and blood of our Saviour Christ are not only in heaven, but here, to wit, upon or before the altars (thereby referring to the communion tables) of the churches of the United Church of England and Ireland in the consecrated elements.

19. That in or by the passages hereinbefore set forth in the sixth preceding article, you have maintained or affirmed and promulgated the position that the holy communion table is an altar of a sacrificial character, at which the ministering priests of the Church of England discharge a sacerdotal office at the celebration of the holy communion, and that at such celebration there is a living, real and spiritual offering of Jesus Christ by the ministering priest.

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20. That in or by the passage lettered H, hereinbefore set forth in the sixth preceding article, you have maintained or affirmed and promulgated the doctrine that adoration or worship is due to the consecrated bread and wine.

21. That in or by the passages hereinbefore set forth in the seventh preceding article, you have maintained or affirmed and promulgated the doctrine that, in the sacrament of the Lord's Supper, there is an actual presence of the body and blood of our Lord in the consecrated bread and wine.

22. That in or by the passages hereinbefore set forth in the seventh preceding article, you have maintained or affirmed and promulgated the doctrine that the body and blood of our Lord are actually and objectively present upon the altars (thereby referring to the communion tables) of the churches of the said United Church of England and Ireland, under the form or veil of, and in the sacramental bread and wine, by virtue of, upon, and after the consecration of the same, irrespectively of the faith and worthiness of the communicant, so as to be received by all communicants irrespectively of their faith and worthiness.

23. That in or by the passages hereinbefore set forth in the seventh preceding article, you have maintained or affirmed and promulgated the doctrine, that the body and blood of our Lord are actually and objectively present upon the altars (thereby referring to the communion tables) of the churches of the said United Church of England and Ireland, under the form or veil of, and in the consecrated bread and wine, prior to, and separately from, the act of reception by the communicants.

24. That in or by the passages hereinbefore set forth in the seventh preceding article, you have maintained or affirmed and promulgated the doctrine that in the holy communion the natural body and blood of our Saviour Christ are not only in heaven, but here, to wit, upon or before the altars (thereby referring to the communion tables) of the churches of the United Church of England and Ireland, under the form or veil, of bread and wine.

26. That in or by the passages hereinbefore set forth in the seventh preceding article, you have maintained or affirmed and promulgated the position that the holy communion table is an altar of a sacrificial character, at which the ministering priests of

the United Church of England and Ireland discharge a sacerdotal office at the celebration of the holy communion, and that at such celebration there is a living, real, and spiritual offering of Christ by the ministering priest.

27. That in or by the passages lettered N, O, and S, hereinbefore set forth in the seventh preceding article, you have maintained or affirmed and promulgated the doctrine that adoration is due to Christ, present upon the altars (thereby referring to the communion tables) of the churches of the said United Church of England and Ireland in the sacrament of the holy communion under the form of bread and wine, on the ground that under their veil is the sacred body and blood of our Lord and Saviour Jesus Christ.

The defendant did not appear, and the proceedings were carried on in pœnam.

The case came on for hearing on the 16th of June.

A. J. Stephens, Q.C., Dr. Tristram, Archibald, and *Benjamin Shaw,* were counsel for the promoter.

Witnesses were called to prove that the writings complained of in the articles were written by the defendant and published by his direction.

The counsel for the promoter then proceeded to argue that the passages set out in the articles affirmed doctrines repugnant to the doctrines of the Church. The argument commenced on the 16th, and was continued on the 17th and 18th of June.

It is impossible to give any adequate abstract of the argument without far exceeding the limits of an ordinary report, but the chief points dwelt upon may be gathered from the words used by the leading counsel for the promoter at the conclusion of his argument. They were as follows:—

"The contrariety and opposition of the doctrines maintained by Mr. Bennett to the authoritative teaching of the Church of England, on the subject of the holy eucharist, which has thus been proved in detail by reference to her formularies, will appear more clearly and concisely if I now, in conclusion, proceed to contrast the propositions which, in the first division of my argument, were deduced from the Thirty-nine Articles and other formularies of

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the Church as embodying her doctrines, with the deductions which have by fair legal construction been drawn from Mr. Bennett's publications.

"The *first* proposition established as the doctrine of the Church of England respecting the Lord's Supper was, 'That the natural body of Christ—that is, his *true actual human* body, now in a glorified and spiritual condition—is in Heaven, and not here.'

"The teaching of Mr. Bennett has been ascertained to be, 'That there is a visible presence of our Lord upon the altars of our churches, and that there is here, before God's altar, the presence of the Son of God *in human flesh subsisting;* that the natural body and blood of our Lord and Saviour Jesus Christ are not only in Heaven, but here—to wit, upon or before the altars of our churches, *under the form of bread and wine.*'

"This teaching is contrariant to the doctrine of the Church.

"The *second* proposition established as the doctrine of the Church of England was, 'That, consequently upon the *first* proposition, there is no presence of the true body of Christ *in the elements* at any time.'

"The teaching of Mr. Bennett is, 'That there is an actual presence of the body and blood of our Lord *in* the consecrated bread and wine.'

"This proposition is contrariant to the doctrine of the Church.

"The *third* proposition established as the doctrine of the Church of England was, 'That the body and blood of Christ are not present upon consecration, in the elements on the "altar," or in the hand of the minister.' And the *fourth* proposition was, 'That the body of Christ is not received by the hand or by the mouth of the communicant, nor by any corporal mode of reception, but only in an heavenly and spiritual manner by the means of faith alone; that is to say, the body of Christ is given by God only, and not by the priest; is taken by faith only, and not by the hand; is eaten by the soul only, and not by the mouth.'

"The teaching of Mr. Bennett is, 'That there is an actual presence, called by him at one time a visible presence, at another time an objective presence, of the body and blood of Christ *in* the consecrated bread and wine, without or external to the communicant, by virtue of or upon the words of consecration, irrespective

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of the faith of the communicant,—a presence given to all who receive the elements—a presence prior to and separate from the act of reception.'

"This teaching is contrariant to the doctrine of the Church.

"The *fifth* proposition established as the doctrine of the Church of England was, "That since the body and blood of Christ are not present in the elements, on the altar, nor in the hand of the priest, there can be no offering or sacrifice of the body and blood of Christ made by the priest to God; that such supposed sacrifice of Christ by the priest is derogatory to the one single and all-sufficient sacrifice of the death of Christ, made once for all upon the cross.'

"The teaching of Mr. Bennett is, 'That the holy communion table is an altar of sacrifice, and that in the celebration of the holy communion there is a great sacrifice or offering of Jesus Christ by the ministering priest, a living, real, and spiritual offering of Christ by the priest.'

"This teaching is contrariant to the doctrine of the Church.

"The *sixth* proposition established as the doctrine of the Church of England was, 'That since the true substance of bread and wine remains in the consecrated elements, and may not be adored without idolatry; and since the true body and blood of Christ are in Heaven, and not in the elements, and, therefore, may not therein be adored, no adoration is due, or ought to be done, to or towards the sacramental elements.'

"Mr. Bennett's teaching is, 'That adoration or worship is due to the consecrated bread and wine in the holy communion; that adoration is due to Christ present upon the altars of our churches, under the form of bread and wine, on the ground that under their veil is the sacred body and blood of our Saviour Jesus Christ.'

"This teaching is contrariant to the doctrine of the Church.

"In conclusion, the principles which are the foundation of all human knowledge of the sacred and mysterious subject of the Lord's Supper are these:—'1. The body of Christ when on earth was a human body in a *natural* condition *until his resurrection.* 2. *After* his resurrection and ascension the same human body was glorified, and is now in Heaven, and will there abide until the end of the world. 3. In the sacrament of the Lord's Supper *grace* is

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imparted to the faithful communicants from the body and blood of Christ, which yet remain in Heaven. 4. The body and blood of Christ never *descend* to earth, yet they are *verily and indeed taken and received* by the faithful in the Lord's Supper by way of spiritual communication. 5. What this way of spiritual communication is, the Church of England has not defined beyond declaring in the 28th Article that it is heavenly and spiritual.'

"The whole of my argument therefore culminates in this one principle, viz., that the natural body of our blessed Lord and Saviour Jesus Christ, his true actual spiritual body—and He has none other—is in Heaven, and not here. And therefore his body is communicated to the faithful receiver, not in the consecrated *elements*, but in the *rite* or *ordinance* of the Lord's Supper duly received.

"Apply this test to all the charges against the defendant, and it is submitted that it is impossible to arrive at any other legitimate conclusion than this, viz., that the doctrines maintained and published by Mr. Bennett contravene the laws ecclesiastical of the Church of England."

Cur. adv. vult.

July 23. SIR ROBERT PHILLIMORE. This is a criminal suit in which the office of the judge is promoted in this Court by virtue of letters of request from the late Bishop of Bath and Wells. The promoter of the office is Mr. Sheppard, a parishioner of Frome Selwood. The defendant is the Rev. William James Early Bennett, vicar of that parish. The defendant has not appeared, and the proceedings are therefore carried on in pœnam. The admission of the articles was moved before me on the 26th of October, 1869; and on the 30th of that month I directed the articles "to be reformed by omitting all such parts thereof as charge the respondent with contravening the 29th Article of religion, entitled 'Of the wicked which eat not the body of Christ in the use of the Lord's Supper.'"

From this an appeal was prosecuted, by permission of the Court, to the Judicial Committee of the Privy Council, who, on the 26th of March, 1870, affirmed the judgment of this Court, and on the 8th of April the cause was by Order in Council duly remitted to

me. No further steps, however, were taken in the prosecution of the suit until the 3rd of June, nor was the remission filed until shortly before that time, after I had thought it my duty to call attention in open court to the delay, it being the established practice of the Court to dismiss a suit when not conducted with all reasonable expedition.

I have been informed that the delay was occasioned by an unsuccessful application to the present Bishop of Bath and Wells for further letters of request, in order to warrant a fresh charge against the defendant. I am of opinion, however, that the instrument of remission ought to have been filed immediately on execution, and for the future I shall expect that this course be taken.

Nature of the Charge.

The defendant is charged with the maintenance and promulgation of certain heresies alleged to be contained in an essay entitled "Some Results of the Tractarian Movement of 1833" contained in a book entitled "The Church and the World;" and also in the second and third editions of a pamphlet entitled "A Plea for Toleration in the Church of England, in a Letter to the Rev. E. B. Pusey, D.D., Regius Professor of Hebrew, and Canon of Ch. Ch., Oxford." The formal evidence respecting the position of Mr. Bennett as a beneficed clerk in holy orders, and that which was requisite to establish the authorship and publication of the works in question, has been duly given in this Court.

The criminal articles charge the defendant with having promulgated certain doctrines respecting the holy communion which may be classed under the following categories:—

1. Opinions with respect to the presence of our Lord in the blessed sacrament.

2. Opinions with respect to a sacrifice said to be offered in the administration of that sacrament.

3. Opinions with respect to the adoration of the consecrated elements and of our Lord in that sacrament.

It is alleged in the criminal articles that Mr. Bennett has promulgated opinions upon all these subjects which are heretical, and which contravene the formularies of our Church.

In two former judgments I have stated that, in order fully to understand and duly to construe these formularies, one fundamental truth must be borne in mind, namely, that the end and object of

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our Church was so to reform her doctrine and ritual as to bring them into general harmony with those of the primitive catholic undivided church.

This truth is, indeed, elementary to all who have studied the ecclesiastical history of England, and examined the legal foundations upon which the Church was established in these realms; nevertheless, it is a truth to which in former litigation perhaps I may be permitted to say due prominence has scarcely been given, or which has been occasionally lost sight of in the multiplicity of facts and details which surround the gradual progress of that epoch which is somewhat vaguely called the Reformation in this kingdom.

It was, perhaps, never more clearly stated than in the quaint but vigorous language of the very learned Donne, when preaching on the observance of Trinity Sunday. He said: "Which day our Church, according to that peaceful wisdom wherewithal the God of peace, of unity, and concord had inspired her, did in the Reformation retain and continue out of her general religious tenderness and holy loathness to innovate anything in those matters which might be safely and without superstition continued and entertained. For our Church, in the Reformation, proposed not that for her end how she might go from Rome, but how she might come to the truth; nor to cast away all such things as Rome had depraved, but to purge away those depravations, and conserve the things themselves so restored to their first good use." (1)

I have again drawn attention to this legal and historical fact, because on no subject, perhaps, has it a more important bearing than on the subject of the due construction of those parts of our formularies which relate to the holy sacraments.

Historical Notice of the Formularies.

Some historical notice of these formularies in their relation to the sacraments naturally precedes a consideration of their true meaning and construction.

Early in the year 1530 the first confession of the Saxon Reformers was presented at the Diet in Augsburg to the Emperor Charles V. This document, known as the "Confession of Augsburg," appears to have influenced the first formularies of faith drawn up in England after the rejection of the papal supremacy by convocation in

(1) Donne's Works, vol. ii. Ser. xlii. p. 248.

1534. The 13th Article of the Confession, "de usu sacramentorum," teaches that sacraments are not only badges (notæ) of our Christian calling, but rather signs and testimonies of God's will towards us, ordained for the purpose of exciting and confirming faith. It also condemns those who maintained that sacraments justify "ex opere operato," and neglected to teach that faith is required to the profitable use of sacraments. (1) The 10th Article, "De cœnâ Domini," declares that the body and blood of Christ are truly present (2) (vere adsint), and are distributed to the recipients. It also censures those who maintained a contrary tenet. (3)

Meanwhile the Church of England had her full share of the religious trouble which distracted the rest of Christendom, and during which "the favourers of the old and the new learning," according to a phrase current at that time, arranged themselves, the former under the leadership of Gardiner, Bishop of Winchester, and the latter under Cranmer and Ridley; and there sprang up a variety of sects, among which the Anabaptists were conspicuous, threatening the destruction of the Church. In 1536 appeared the Ten English Articles of Religion, which were probably composed by a committee of divines, over whom Henry VIII., either personally or by means of his vicar-general, presided. The 4th Article was entitled the "Sacrament of the Altar," and set forth that "under the form and figure of bread and wine, which we there presently do see and perceive by outward senses, is substantially and really comprehended the very self-same body and blood of our Saviour, which was born of the Virgin Mary, and suffered upon the cross for our redemption;" that "the very self-same body and blood of Christ, under the same form of bread and wine, is corporally, really, and in very substance exhibited, distributed, and received unto and of all them which receive the said sacrament; and that as a consequence the sacrament is to be used with all due reverence and honour, and after careful self-examination." (4)

It is very doubtful whether these articles were ever sanctioned

(1) Hardwick's History of the Articles, p. 28.

(2) Wahrhaftiglich unter Gestalt des Brots and Weins im Abendmahl gegenwärtig sey.

(3) Hardwick's History of the Articles, p. 27.

(4) Hardwick's History of the Articles, p. 54.

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by Convocation. Their direct influence, whatever it was, appears to have been destroyed by the promulgation of another formulary of faith, entitled "The Institution of a Christian Man," which was published in the following year, 1536, upon which (1) these articles were to a great extent engrafted. It was called the Bishop's Book, and the influence of Cranmer and Ridley prevailed when it was compiled. It contained, among other things, an exposition of the Seven Sacraments, and an article on the "Sacrament of the Altar," which taught that under the form and figure of bread and wine *verily, substantially, and really* was contained the very self-same body of our Saviour Christ which had been born and crucified; and that "the very self-same body and blood of Christ is corporally, really, and in the very substance exhibited, distributed, and received of all them which receive the sacrament."

In 1543, the next formulary, entitled "The Necessary Doctrine and Erudition of a Christian Man," or "the King's Book," was published. It appears to have been approved by Convocation. (2) It may be observed that the account given by Burnet on this point, as indeed on many others, is loose and inaccurate. (3)

This work was in a great measure a revised edition of the Bishop's Book; but of it Collier not unjustly observes, "It seems mostly to lose ground and reform backwards (4);" in fact, the influence of Gardiner caused the restoration in this work of some exclusively Roman doctrines which had been omitted in the Bishop's Book.

In the meanwhile, however, it appears that with a view to effect an agreement between the Augsburg Reformers and the Church of England, thirteen articles were compiled in 1538, under the influence of Cranmer. They never obtained any legal status, but it seems certain that they had great influence on the present articles, if indeed they were not their groundwork. (5)

After this time, Henry VIII. carried on some negotiations with the German Reformers as to adopting in a greater or less degree the tenets of the Council of Augsburg. But various circumstances

(1) Hardwick's History of the Articles, p. 59.

(2) Jenkyns' Cranmer, I.–XXXVII., s. 188, 189 (note); Hardwick on the Articles, 59 (note).

(3) Archbishop Laurence, Bampton Lectures, 1, note 4.

(4) Ecclesiastical History, vol. ii. 191.

(5) Hardwick on the Articles, p. 69.

gave Bishop Gardiner an ascendancy over Henry, to which we owe "the bloody statute of the Six Articles," which was enacted by Convocation and Parliament in 1539 (31 Hen. 8, c. 14), and by which the belief in the doctrine of transubstantiation was enforced. This Act was repealed by 1 Edw. 6, c. 12, in 1547.

On the accession of Edward VI. in 1547, Cranmer's influence was very great, and entirely prevailed over that of Gardiner and his colleagues. In that year, it is not unimportant to observe, the First Book of Homilies was put forth under the auspices of Cranmer.

In 1548 the King appointed Cranmer and other divines "to draw an order of Divine worship, having respect to the pure religion of Christ taught in the Gospel, and to the practice of the primitive church."

The result was, our first prayer-book of 1548. The Act was passed early in 1549.

In 1548, Cranmer put forth on his own authority a catechism translated from the original of Justus Jonas. It was of a decidedly Lutheran character. (1)

In 1552 the second prayer-book was published.

In the same year appeared the Forty-two Articles of Religion; and Cranmer, in this compilation, made great use of the Augsburg confession.

The "Necessary Doctrine of a Christian Man," except in so far as it was modified by the prayer-book, and perhaps by the homilies, was still the standard of belief until the promulgation of the Forty-two Articles. They were promulgated under the authority of the Crown in Latin and English in 1553; they were said to have been "agreed on by the bishops and other learned and godly men." It is doubtful whether they ever received the sanction of Convocation; they were not enacted by Parliament.

Cranmer and Ridley were the chief compilers of the prayer-book and of these articles.

In the compilation of the latter it is probable that Cranmer had the greater share.

The subject of the holy eucharist presented the greatest difficulty to the compilers of our formularies. Whether regard was had to

(1) Archbishop Laurence, Bampton Lectures, 16, 17 (note).

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the expediency of uniting reformed churches abroad, or members of the Church at home, Cranmer's opinion on this subject inclined to that of Luther, but his erudition was chiefly if not entirely derived from Ridley. (1) From what source this prelate derived his opinion is therefore a matter of great moment, to be hereafter considered. In this place I will only notice that there is a not unimportant difference between the article as to the Lord's Supper in this compilation, and the article on that subject in the compilations of 1562 and 1571.

Queen Elizabeth succeeded to the throne in 1558, and the master-mind which presided over the next compilation of the articles was that of Archbishop Parker. The second prayer-book of Edward VI. was restored with certain alterations; but, though Parker was from the first anxious to recast the articles of religion, it was not till the year 1562 that they were discussed by Convocation, and having been adopted by it, were ratified by the Crown in 1563. No subscription, however, was required to the articles till the year 1571, when it was enforced both by a canon of Convocation and an Act of the legislature.

It is to be observed with respect to the articles of 1563, that the Latin copy, which was legally binding upon the clergy, did not contain the 29th Article as to the reception of the eucharist by the wicked. This 29th Article does, however, appear in the authorized version of the articles of 1571, though there is reason to doubt whether it ever was comprised "in the book imprinted," to which in the most singular manner the statute 13 Eliz. c. 12, alone refers as an authority for the articles.

The second book of the homilies was first published in the year 1562.

The first part of the catechism was a portion of Edward VI.'s first prayer-book; but the latter part, which relates to the holy sacraments, was added by the authority of James I., after the Hampton Court Conference, and was probably written by Bishop Overall, then dean of St. Paul's; to it the present Act of Uniformity, 13 & 14 Car. 2, c. 2, gives the force of a statute.

When the last and present prayer-book was enacted by the statute of Charles II., some alterations were made in the service of

(1) Hook's Lives of the Archbishops of Canterbury, vol. ii. (N. S.) p. 366.

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the Holy Communion, which will require notice hereafter, but the articles, catechism, and canons underwent no change.

To this brief historical and legal sketch of the formularies of our Church in their relation to her doctrine of the holy eucharist, I will add a few words as to the position which this doctrine occupied before and during the time when these various formularies were put forth.

Historical Notice of the Doctrine of the Holy Eucharist.

For more than 800 years "no curious and intricate speculations," to use Hooker's weighty language (1), hindered or abated the faith of Christendom in the words of the Divine Founder of this holy sacrament. The command, "Take, eat, this is my body; drink ye all of this, this is my blood," was obeyed with holy reverence, present joy, and uninquiring faith. The whole undivided Church believed in the great mystery of a presence of our Lord in the eucharist.

The language of the Fathers on this subject indeed was often ardent, mystical, and rhetorical, adapted to persuade and to induce practice rather than to convince by accurate reasoning or strict logic; and, in their writings, both the supporters of a carnal presence in the elements, and of the doctrine of no presence, have sought in later times for a confirmation of their respective tenets. But these writings, it must be remembered, were the works of men who wrote without the necessity for accurate precision of language, which an existing controversy on the subject written about imposes on the writer, for no controversy then existed as to the mode in which Christ was present in this sacrament; though it may be observed, in passing, that distinct statements of a spiritual presence in the elements are to be found in these writings. (2)

In the middle of the ninth century, Paschasius Radbert, abbot of the monastery of New Corbey, in Saxony, wrote a treatise in which he maintained, or was supposed to maintain, that after consecration the very body and blood, the same flesh in which Christ was born and in which he died, was physically substituted for the bread and wine, which, however, still appeared to remain. The doctrine was immediately protested against; the principal opponent had been a monk of the monastery of Old Corbey, and then pre-

(1) Hooker, E. P. vol. ii. p. 3; ed. 1825.

(2) Bishop of Ely on the Articles, pp. 679, 680.

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sided over a monastery in Amiens, by name Ratramn (sometimes erroneously called Bertram). Ratramn, at the request of Charles the Bald, examined the book of Paschasius, and answered it, maintaining that the true doctrine of the Church was a real spiritual presence of Christ, under the covering or veil (sub tegumento, velamine, specie) of the elements. This work became, from subsequent events, of great importance to the whole Church, and especially to the Church of England.

About the year 970, Ælfric, Abbot of Malmesbury, wrote a sermon of the Paschal Lamb and of the sacramental body and blood of Christ, and a letter to Wulfstone, Archbishop of York, in both of which he maintained the doctrine of Ratramn, and in the former of which he reproduced the argument and some of the principal passages of Ratramn, "pœne ad verbum," as the learned Cave says.

From circumstances too numerous to be here stated, the new doctrine of Paschasius was upholden at Rome, and after many struggles and much persecution was finally embodied in the fourth Latin Council of Lateran (A.D. 1215), by the new name, coined, as the great canonist Suarez admits, for the purpose of "transubstantiatio."

But in the fifteenth century, and at the time of the Reformation, this doctrine was again submitted to severe scrutiny; and, as has so often happened, the arbitrary and violent conduct of Rome in attempting to force upon the consciences of men an exclusive, uncatholic, and unjustifiable definition of a holy mystery, produced every kind of variety of opinions and speculation respecting it. The Greek Church has wisely refrained from such an attempt. (1) Cranmer, or at least Ridley, and afterwards Parker, endeavoured to steer a safe course, looking for the beacon of Catholic and primitive teaching as their guide. The Roman system generated that state of things which Durandus not inaptly describes:—

> "Corpore de Christi lis est, de sanguine lis est,
> Deque modo lis est, non habitura modum." (2)

Germany and Switzerland teemed with differences of opinion on this subject.

(1) See Palmer's Treatise on the Church, vol. i. p. 211; ed. 1839.

(2) Cited by Bishop Forbes in his "Consid. modestæ," p. 380.

The subtler doctors of Rome have sought to maintain transubstantiation by the averment that though the *property* of the elements was changed, the *accidents* of colour, shape, taste, &c., remained the same. Luther taught, or was supposed to teach, that the elements and the actual body were blended together; and his teaching has been designated, improperly, according to high authority, by the term "consubstantiation," or "impanation." Zwinglius taught that the eucharist was a bare commemoration of the death of Christ, and the bread and wine merely tokens to remind us of his death. (1)

It is probable that during the reign of Henry VIII. Cranmer had not ceased to believe in transubstantiation, though it is difficult to be at all certain upon this point. But with respect to Ridley, it is certain, not only that Ratramn "first pulled him by the ear," (2) to borrow Ridley's expression, but that he derived from the work of Ratramn (which appears to have been first printed at Geneva in 1532, and which he first became acquainted with in 1545),

(1) The following verses are taken from Beaumont's "Psyche, or Love's Mystery, the intercourse between Christ and the Soul," 1642. He was Regius Professor of Divinity at Cambridge for twenty-nine years:—

"104.

"Needs will they peep into the manner how
This hidden miracle to pass was brought,
And madly, being not content to know
What Christ thought fit to teach them, study out
They know not what, and *make this banquet prove*
A Sacrament of war, and not of love.

"105.

"Some press too near, and spy what is not there,
Some carelessly take what is there away,
Some will confess no miracle, for fear
That consequent be ushered in, which they
Resolve to stop, or that their faith should be,
Forced to confess more than their eyes can see.

"107.

"Some sift existence, substance, accidents,
Concomitance, through logick's busy sieve:
Trans, *sub*, and *con*, by strange experiments
They boult so long, that they themselves deceive:
For whilst to win the precious flour they strain,
The coarse and refuse bran is all they gain."

(2) Ridley's Works (Parker Society), p. 206.

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those opinions upon the presence which he ever afterwards maintained, and which he endeavoured, as it should seem successfully, to instil into Cranmer. (1)

It is perhaps even more remarkable that in the reign of Elizabeth the Anglo-Saxon homily of Ælfric was printed by order of Archbishop Parker, who, as will presently be seen, subscribed it in company with his suffragans, as containing both the ancient and present teaching of the Church on the presence. There are, indeed, two exceptions of passages manifestly stuffed in or "infarced," as the expression is, as a pious fraud by some believer in transubstantiation, but which were no part of the original homily.

Upon the whole it will appear, I think, from an examination of the formularies, and from the language of the authorities which I am about to cite, that they were intended to set forth, and do set forth, the doctrine of a real spiritual presence in the holy eucharist. It may be said with truth that on some formularies this doctrine is more doubtfully or more faintly impressed than on others; but the result which I have stated is not only the legal inference from the construction of all the formularies, but also especially from those which are in their nature the most important and as a matter of history, the latest in date. (2) Though, indeed, that there is a change in the holy elements after consecration, and that they then convey in a divine ineffable way the body and blood of Christ, seem necessary inferences from the language of the communion service alone.

When I come to examine the specific charges against the defendant, it will be my duty to consider whether the Church has defined in any way the mode of this presence, and if so, whether she has defined it by an affirmative dogma, or whether she has contented herself with a declaration against particular modes, and, with the exception of those so declared against, left an entire liberty to her children upon this subject.

Principles of Judicial Construction applicable to cases like the present.

The general position that the formularies of the Church do allow within certain limits a liberty of private opinion has been laid down by the Ecclesiastical Courts and by the Judicial Committee

(1) 3 Jenkyn's Cranmer, 143.—Robertson's Christian Church, vol. ii. p. 288 (note).—Bishop of Ely on the Articles, 704–5.—Ridley's Works, 166, 169.

(2) Bishop of Ely on the Articles, p. 678.

of the Privy Council. And I think it will be convenient to cite in this place the exact language which in various cases has been applied by these tribunals to this subject.

In the first reported case, that of Her Majesty's *Procurator-General* v. *Stone*, Lord Stowell, sitting in the Consistory of London, said:—

I think myself bound at the same time to declare, that it is not the duty nor inclination of this Court to be minute and rigid in applying proceedings of this nature; and that if any article is really a subject of dubious interpretation, it would be highly improper that this Court should fix on one meaning, and prosecute all those who hold a contrary opinion regarding its interpretation. It is a very different thing where the authority of the articles is totally eluded, and the party deliberately declares the intention of teaching doctrines contrary to them." (1)

And, in the case of Mr. Gorham, the Judicial Committee of the Privy Council said:—

There are other points of doctrine respecting the sacrament of baptism which we are of opinion are, by the rubrics and formularies (as well as the articles) capable of being honestly understood in different senses; and consequently we think that, as to them, the points which were left undetermined by the articles are not decided by the rubrics and formularies, and that upon these points all ministers of the Church, having duly made the subscriptions required by law (and taking Holy Scripture for their guide) are at liberty honestly to exercise their private judgment without offence or censure.

Upright and conscientious men cannot in all respects agree upon subjects so difficult; and it must be carefully borne in mind that the question, and the only question for us to decide, is, whether Mr. Gorham's doctrine is contrary or repugnant to the doctrine of the Church of England as by law established. Mr. Gorham's doctrine may be contrary to the opinions entertained by many learned and pious persons, contrary to the opinion which such persons have, by their own particular studies, deduced from Holy Scripture, contrary to the opinion which they have deduced from the usages and doctrines of the primitive Church, or contrary to the opinion which they have deduced from uncertain and ambiguous expressions in the formularies; still, if the doctrine of Mr. Gorham is not contrary or repugnant to the doctrine of the Church of England as by law established, it cannot afford a legal ground for refusing him institution to the living to which he has been lawfully presented. (2)

In the examination of this case we have not relied upon the doctrinal opinions of any of the eminent writers, by whose piety, learning, and ability the Church of England has been distinguished; but it appears that opinions, which we cannot in any important particular distinguish from those entertained by Mr. Gorham, have

(1) *Her Majesty's Proctor* v. *Stone*, 1 Consist. p. 428.

(2) *Gorham* v. *Bishop of Exeter*. The Gorham Case, by E. F. Moore, pp. 471, 472.

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been propounded and maintained, without censure or reproach, by many eminent and illustrious prelates and divines who have adorned the Church from the time when the articles were first established. We do not affirm that the doctrines and opinions of Jewel, Hooker, Usher, Jeremy Taylor, Whitgift, Pearson, Carlton, Prideaux, and many others, can be received as evidence of the doctrine of the Church of England, but their conduct, unblamed and unquestioned as it was, proves, at least, the liberty which has been allowed of maintaining such doctrine. (1)

We express no opinion on the theological accuracy of these opinions, or any of them. The writers whom we have cited are not always consistent with themselves, nor are the reasons upon which they found their positions always valid; and other writers of great eminence, and worthy of great respect, have expressed very different opinions. But the mere fact that such opinions have been propounded and maintained by persons so eminent and so much respected, as well as by very many others, appears to us sufficiently to prove that the liberty which was left by the articles and formularies has been actually enjoyed and exercised by the members and ministers of the Church of England. (2)

And in the case of *Burder* v. *Heath*, Dr. Lushington, who had been one of the Lords of the Privy Council in the *Gorham Case*, sitting as judge of the Court of Arches, observed :—

And I apprehend that the course to be followed is, first, to endeavour to ascertain the plain grammatical sense of the article of religion said to be contravened, and if that article admit of several meanings, without any violation of the ordinary rules of construction or the plain grammatical sense, then I conceive that the Court ought to hold that any such opinion might be lawfully avowed and maintained.

If, indeed, any controversy arise whether any given meaning is within the plain grammatical construction, the Court must form the best judgment it can, with this assistance, as I have already said, that if the doctrine in question has been held without offence by eminent divines of the Church, then, though perhaps difficult to be reconciled with the plain meaning of the articles of religion, still a judge in my position ought not to impute blame to those who hold it. That which has been allowed or tolerated in the Church ought not to be questioned by this court. (3)

And again the same learned judge says :—

Before concluding, I think it right to explain why I do not advert to the many authorities which the zeal and learning of counsel have produced. My reason is this, that, in my judgment, not one of these authorities does that which was required in this case, namely, shew that some divine of eminence has held, without reproach from ecclesiastical authority, doctrines in substance the same as those

(1) *Gorham* v. *Bishop of Exeter*. The Gorham Case, by E. F. Moore, p. 472.

(2) *Gorham* v. *Bishop of Exeter*. The Gorham Case, by E. F. Moore, p. 474.

(3) *Burder* v. *Heath*, 15 Moore's P. C. Rep. p. 45.

Mr. Heath has promulgated; whatever opinions may have been held in the vast field of polemical divinity, I find none which support Mr. Heath or justify him. In the *Gorham Case* the Judicial Committee had the advantage of being able to quote, in support of their judgment, and in justification of Mr. Gorham, passages from the writings of divines of the highest authority. (1)

And again:—

No explanation has been offered which in any way shews that Mr. Heath's opinions can be reconciled with the articles, nor has any eminent divine been shewn to have shared his views. Mr. Heath therefore must be condemned by the articles imposed by law, and which the law alone can change. (2)

In the recent cases, commonly called the cases of Essays and Reviews, Lord Westbury, delivering the judgment of the Privy Council, said:—

Our province is, on the one hand, to ascertain the true construction of those articles of religion and formularies referred to in each charge, according to the legal rules for the interpretation of statutes and written instruments; and, on the other hand, to ascertain the plain grammatical meaning of the passages which are charged as being contrary to or inconsistent with the doctrine of the Church, ascertained in the manner we have described.

It is obvious that there may be matters of doctrine on which the Church has not given any definite rule or standard of faith or opinion; there may be matters of religious belief on which the requisition of the Church may be less than scripture may seem to warrant; there may be very many matters of religious speculation and inquiry on which the Church may have refrained from pronouncing any opinion at all. On matters on which the Church has prescribed no rule, there is so far freedom of opinion that they may be discussed without penal consequences. Nor, in a proceeding like the present, are we at liberty to ascribe to the Church any rule or teaching which we do not find expressly and distinctly stated, or which is not plainly involved in or to be collected from that which is written. (3)

And again his Lordship said:—

There remain the Commination Service and the Athanasian Creed. The material passage in the Commination Service is in these words: "O terrible voice of the most just judgment which shall be pronounced upon them, when it shall be said unto them, Go, ye cursed, into the fire everlasting which is prepared for the devil and his angels." In like manner the Athanasian Creed declares that they that have done evil shall go into everlasting fire. Of the meaning of these words "everlasting fire," no interpretation is given in the formularies which are referred

(1) *Burder* v. *Heath*, 15 Moore's P. C. Rep. p. 64. 9 Jur. N.S. 245.

(2) *Burder* v. *Heath*, Brodrick and Fremantle, Privy Council Judgments, p. 229.

(3) *Williams* v. *The Bishop of Salisbury*, and *Wilson* v. *Fendall*, Moore's P. C. Rep. (N. S.) vol. ii. p. 424. 10 Jur. N.S. 441.

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to in the charge. Mr. Wilson has urged in his defence that the word "everlasting" in the English translation of the New Testament, and of the creed of St. Athanasius, must be subjected to the same limited interpretation which some learned men have given to the original words which are translated by the English word "everlasting," and he has also appealed to the liberty of opinion which has always existed without restraint among very eminent English divines upon this subject. (1)

And again:—

We are not required, or at liberty, to express any opinion upon the mysterious question of the eternity of final punishment, further than to say that we do not find in the formularies, to which this article refers, any such distinct declaration of our church upon the subject as to require us to condemn as penal the expression of hope by a clergyman that even the ultimate pardon of the wicked, who are condemned in the day of judgment, may be consistent with the will of Almighty God. (2)

Special Charges.—1. Visible Presence of Our Lord in the Holy Eucharist.

The charge against the defendant which I propose first to consider is contained in the 15th and 16th articles, and is founded on a passage in the second edition of his work, entitled "A Plea for Toleration, &c." In that work he speaks "of the visible presence of our Lord upon the altars of our churches."

I have read these words with much surprise and sorrow.

If a private clergyman of the Church of England, holding no position which renders it in any way incumbent upon him to publish his opinions to the world at all, nevertheless steps out of the ordinary course of his parochial duty to discharge the office of a public writer upon the most awful mystery of our holy religion, the least that our Church has a right to expect from him is the knowledge and erudition of a theologian, and the use of the most careful and well-considered language.

The great divines of our Church, feeling and knowing the mode of Christ's presence to be a mystery which is rather to be adored in the silence of the heart than made the subject of controversy, have, as it were, feared to tread when they approached the precincts of it; and, being well versed both in history and theology, knowing therefore how much hasty, ill-chosen, inadequate, and presumptuous expressions upon this subject have contributed to the schisms of Christendom, and fearful of leading others astray,

(1) *Williams* v. *The Bishop of Salisbury*, and *Wilson* v. *Fendall*, Moore's P. C. Rep. (N. S.) vol. ii. p. 432. 10 Jur N.S. 412.

(2) *Williams* v. *The Bishop of Salisbury*, and *Wilson* v. *Fendall*, Moore's P. C. Rep. (N. S.) vol. ii. p. 433. 10 Jur N.S. 412.

have been silent, or, if it were necessary to speak, studiously guarded and reverently careful in their language.

"All things considered," says Hooker, "and compared with that success which truth hath hitherto had by so bitter conflicts with errors in that point, shall I wish that men would more give themselves to meditate with silence what we have by the sacrament, and less to dispute of the manner how? If any man suppose that this were too great stupidity and dulness, let us see whether the apostles of our Lord themselves have not done the like. It appeareth by many examples that they of their own disposition were very scrupulous and inquisitive, yea, in other cases of less importance and less difficulty, always apt to move questions. How cometh it to pass, that so few words of so high a mystery being uttered, they receive with gladness the gift of Christ, and make no show of doubt or scruple." (1)

. . . . . .

"Where God himself doth speak those things, which, either for height and solemnity of matter, or else for secrecy of performance, we are not able to reach unto, as we may be ignorant without danger, so it can be no disgrace to confess we are ignorant. Such as love piety will as much as in them lieth know all things that God commandeth, but especially the duties of service which they owe to God. As for his dark and hidden works, they prefer, as becometh them in such cases, simplicity of faith before that knowledge, which, curiously sifting what it should adore, and disputing too boldly of that which the wit of man cannot search, chilleth, for the most part, all warmth of zeal, and bringeth soundness of belief many times into great hazard." (2)

Of the impropriety of his language the defendant seems to have been made aware; but, unfortunately, not until he had committed the very rash act of publishing it to the world. I have no hesitation in pronouncing that the expression "visible presence of our Lord upon the altars of our churches" is in its plain meaning at variance with all the formularies of our Church upon the subject, at variance with the language of the service of the holy communion, of the 28th Article, and of the Catechism.

The doctrine which it expresses, to use the language of our Articles, "overthroweth the nature of a sacrament," even more than transubstantiation.

I may add also, that whatever figurative language may be found in the sermons of Eastern Fathers before controversy arose on this subject, I have not been able to find that such a doctrine has ever been maintained in the dogmatic teaching of our own or of any other branch of the Church.

(1) Hooker, E. P., vol. ii. p. 3; ed. 1825.

(2) Hooker, E. P., vol. ii. p. 12; ed. 1825.

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I will consider presently the legal effect of the substitution in a later edition of other language than that which I have here condemned.

2. Other Modes of the Presence in the Holy Eucharist.

I have now to consider the charges, which relate to the modes of the presence in the eucharist, other than that which I have condemned, and which form the subject of the 8th, 9th, 10th, 11th, 14th, 17th, 21st, 22nd, 23rd, and 24th Articles. I find them to be substantially as follows:—

That in the sacrament of the Lord's Supper there is an actual presence of the body and blood of our Lord in the consecrated bread and wine;

That there is an actual presence of the true body and blood of our Lord in the sacramental bread and wine, without or external to the communicant, by virtue of, upon and after the consecration of the same, irrespectively of the faith and worthiness of the communicant, so as to be received by all communicants irrespectively of their faith and worthiness;

That there is an actual presence of the true body and blood of our Lord in the consecrated bread and wine, without or external to the communicants prior to and separate from the act of reception by the communicants;

That in the holy communion the natural body and blood of our Saviour Christ are not only in heaven, but here, to wit, upon or before the altars or communion tables of the Church in the consecrated elements;

That in the holy communion the natural body and blood of our Saviour Christ are not only in heaven, but here, to wit, upon or before the altars or communion tables of the church under the form or veil of bread and wine;

That the body and blood of our Lord are actually and objectively present upon the altars or communion tables of the Church under the form or veil of, and in the sacramental bread and wine, by virtue of, upon, and after the consecration of the same, irrespectively of the faith and worthiness of the communicant, so as to be received by all communicants irrespectively of their faith and worthiness;

That the body and blood of our Lord are actually and objectively present upon the altars (thereby referring to the communion

tables) of the Church under the form or veil of, and in the consecrated bread and wine, prior to and separately from the act of reception by the communicants.

The first question for consideration is, whether the passages extracted from the work of the defendant do contain the opinions which are so charged against him. After an attentive perusal of the passages extracted, I have arrived at the conclusion that they do not contain the opinions relating to the presence of the natural body and blood of our Saviour which are charged in the 11th, 17th, and 24th articles.

The passage which makes the nearest approach to the support of this charge is, I think, in the extract lettered D. in the 5th article, where he speaks of "the fact, that here before God's altar is something far higher, far more awful, more mysterious, than aught that man can speak of, namely, the presence of the Son of God in human flesh subsisting." It seems to me that the author, whose language is lamentably loose and inaccurate, did not mean by these words any more than the presence of the incarnate Son of God, and did not mean to express any opinion as to the presence of his natural flesh and blood. And this opinion is confirmed by a comparison of the passage cited with other passages in his work, such as, for instance, one of the passages cited in the articles before me, lettered G., "a living real *spiritual* offering of Jesus Christ upon the altar," and the often-repeated expression that the presence of which he speaks is one under the veil of the elements of bread and wine, and various other passages which upon the whole lead me to the conclusion that he did not contemplate a physical or natural presence of our Lord. I therefore consider the criminal articles on this point, 11, 17, and 24, not to be proved.

With respect to the other charges, of which I have given the summary, and which are stated at length in the 8th, 9th, 10th, 14th, 21st, 22nd, and 23rd articles, I think that they do fairly represent the opinions of the defendant contained in the passages set out, with one exception, namely, the words "irrespectively of the faith and worthiness of the communicant," which appear to point to an offence against the 29th Article of religion, which was charged in the original articles and struck out by the Court. It may, however, be that these words are merely used in the sense of

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"prior to and separately from the act of reception by the communicants;" and if so, they seem to me to fairly represent the opinion of the defendant.

Object and Intention of the Formularies.

I have now to consider whether these opinions contravene the formularies of the Church, as contained in the passages set forth in the 28th article of charge.

The authority upon which our Church principally relied in her formularies with respect to the sacraments was that of Saint Augustine. His authority is especially referred to in the articles; portions of which are indeed almost translations from his works; and Overall made the definition of Saint Augustine, as subsequently moulded by the schoolmen, the basis of the doctrine on the sacrament contained in our catechism. (1) The "sacramentum" is sometimes used as the "sacræ rei signum," although, as the 25th article expressly asserts, a "signum efficax," as distinguished from a "signum merum," a sign, that is to say, by which, "as by an instrument" (article 27), the thing signified is effected. Sometimes "sacramentum" is used more explicitly for the entire "ritus," in its internal and external elements. As a rite it consists of three parts, the outward elements, which are the signum, the res, which is the inward part or thing signified, that is, as our catechism saith, "The body and blood which are verily and indeed taken and received by the faithful in the Lord's Supper," and the "virtus" or "the benefits whereof we are partakers thereby," that is, the strengthening and refreshing of our "souls with the body and blood of Christ, as our bodies are by the bread and wine." It is in this way that the sacrament of the Lord's Supper is spoken of in our catechism. Bishop Hampden, in his Bampton Lectures, thus remarks:—

Theologians have not been content to rest on the simple fact of the Divine ordinance, appointing certain external rites as essential parts of Divine service on

(1) Sacrificium ergo visibile invisibilis sacrificii sacramentum, id est, sacrum signum est.—Augustin. De Civ. Dei. Lib. x. c. 5.

Sacramentum est sacræ rei signum. Dicitur tamen sacramentum etiam sacrum secretum, sicut sacramentum divinitatis; ut sacramentum sit sacrum signans: sed nunc agitur de sacramento secundum quod est signum. Item, sacramentum est invisibilis gratiæ visibilis forma.—Lombard, Sent. Lib. iv. dist. 1.

the part of man, available to the blessing of the receiver; but they have treated the sacraments as effusions of virtue of Christ, physically quickening and strengthening the soul, in a manner analogous to the invigoration of the body by salutary medicines. The word "sacrament" itself, as understood in the Latin Church, is founded on this notion. Though derived from the military oath of the Romans, and so far bearing the mark of that derivation, as it denotes a solemn pledge of faith on the part of the receiver, in its established theological use it corresponded more properly with μυστήριον of the Greeks. It expressed, at first, accordingly any solemn mysterious truth of religion; and afterwards, by the usage of the schools, was appropriated to those acts in particular by which grace was conceived to be imparted to the soul, under outward and visible signs. The definition indeed, given in the Catechism of the Church of England, is exactly what the scholastic theory suggests; so far, at least, as the language of it characterizes the nature of a sacrament. It is, in the subsequent application of this definition that the Church of England has modified and improved on the fundamental idea of the scholastic doctrine, whilst the idea itself is presented, as being part of the very texture of technical theology. (1)

The 28th Article "of the Lord's Supper" says, "The Supper of the Lord is not only a sign of the love that Christians ought to have among themselves one to another, but rather a sacrament of our redemption by Christ's death;" and it adds, that to the worthy partaker the bread is a partaking of the body of Christ, and the cup a partaking of the blood of Christ; and the 29th Article says, that the wicked "though they do carnally and visibly press with their teeth, as Saint Augustine saith, the sacrament of the body and blood of Christ, yet in nowise are they partakers of Christ, but rather to their condemnation do eat and drink the sign or sacrament of so great a thing."

The first part of the homily concerning the sacrament contains the following passage: "Neither need we to think that such exact knowledge is required of every man, that he be able to discuss all high points in the doctrine thereof; but thus much we must be sure to hold, that in the Supper of the Lord there is no vain ceremony, no bare sign, no untrue figure of a thing absent (Matt. xxvi.);" that is, we ought to hold affirmatively that it is the true figure of a thing present.

The doctrine contained in these formularies excludes the Zwinglian account of the sacraments. On this point I will cite

(1) Bishop Hampden's Scholastic Philosophy, Lecture VII. p. 32. See also note B. p. 313.

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the opinion of Dr. Liddon, Professor of the Exegesis of Holy Scripture in the University of Oxford, and Canon of St. Paul's.

As our Lord's divinity is the truth which illuminates and sustains the world-redeeming virtue of his death, so in like manner it explains and justifies the power of the Christian sacraments as actual channels of supernatural grace. To those who deny that Jesus Christ is God, the sacraments are naturally nothing more than "badges or tokens" of social co-operation. The one sacrament is only "a sign of profession and mark of difference, whereby Christian men are discerned from others that be not christened." The other is at best "only a sign of the love that Christians ought to have one towards another." Thus sacraments are viewed as altogether human acts; God gives nothing in them; he has no special relation to them. They are regarded as purely external ceremonies, which may possibly suggest certain moral ideas by recalling the memory of a teacher who died many centuries ago. They help to save his name from dying out among men. Thus they discharge the functions of a public monument, or of a ribbon or medal implying membership in an association, or of an anniversary festival instituted to celebrate the name of some departed historical worthy. It cannot be said that in point of effective moral power they rise to the level of a good statue or portrait, since a merely outward ceremonial cannot recal character, and suggest moral sympathy as effectively as an accurate rendering of the human countenance in stone, or colour, or the lines of an engraving. Rites, with a function so purely historical, are not likely to survive any serious changes in human feelings and associations. Men gradually determine to commemorate the object of their regard in some other way, which may perhaps be more in harmony with their personal tastes; they do not admit that this particular form of commemoration, although enjoined by the author of Christianity, binds their consciences with the force of any moral obligation; they end by deciding that it is just as well to neglect such commemorations altogether.

If the Socinian and Zwinglian estimate of the sacraments had been that of the Church of Christ, the sacraments would long ago have been abandoned as useless ceremonies. But the Church has always seen in them, not mere outward signs addressed to the taste or to the imagination, nor even signs (as Calvinism asserts) which are tokens of grace received independently of them, but signs which, through the power of the promise and words of Christ, effect what they signify. They are "effectual signs of grace and God's goodwill towards us, by the which He doth work invisibly in us." Thus in baptism the Christian child is made "a member of Christ, a child of God, and an inheritor of the kingdom of heaven;" and "the body and blood of Christ are verily and indeed taken and received by the faithful in the Lord's Supper." . . . .

That depreciation of the sacraments has led with general consistency to depreciation of our Lord's eternal person, is a simple matter of history. True, there have been and are believers in our Lord's divinity who deny the realities of sacramental grace. But experience appears to shew that their position is only a transitional one. For history illustrates this law of fatal declension even in cases where sacramental belief, although imperfect, has been far nearer to the truth than is the naturalism of Zwingli. Many of the most considerable Socinian congregations

in England were founded by the Presbyterians who fell away from the Church in the seventeenth century. The pulpit and the chair of Calvin are now filled by men who have, alas! much more in common with the Racovian Catechism than with the positive element of the theology of the institutes. The restless mind of man cannot but at last push its principle to the real limit of its application, even although centuries should intervene between the premiss and the conclusion. Imagine that the sacraments are only picturesque memorials of an absent Christ, and the mind is in a fair way that the Christ who is thus commemorated as absent by a barren ceremony is himself only and purely human." (1)

I hold it to have been the intention of the formularies to exclude the Zwinglian doctrine of bare commemoration with respect to the Lord's Supper, although that error be not expressly mentioned.

The next error is, however, by name prohibited. "Transubstantiation," the Article says, "(or the change of the substance of bread and wine) in the Supper of the Lord, cannot be proved by Holy Writ; but is repugnant to the plain words of Scripture, overthroweth the nature of a sacrament, and hath given occasion to many superstitions." (Art. 28.) This is the only mode of the presence which is eo nomine proscribed by the articles. And I am not, therefore, surprised to find that in his charge of the year 1866 to the clergy of his diocese, the Bishop of St. David's, in contrasting our communion service with the Roman missal, and our doctrine of the Lord's Supper with that of Rome, should say:—

And here I cannot refrain from pausing for a moment to remark, that there is perhaps no head of theological controversy in which our Church stands in more advantageous contrast with Rome, or in which we have more reason thankfully to recognise her characteristic moderation, than this. The tenet of transubstantiation, decreed as an article of faith, combines in itself the two extremes of irreverent rationalism and presumptuous dogmatism. (2) . . . .

The Church of England, on the contrary, has dealt with this subject in a spirit of true reverence as well as of prudence and charity. She asserts the mystery, inherent in the institution of the sacrament, but abstains from all attempts to investigate or define it, and leaves the widest range open to the devotional feelings and the private meditations of her children with regard to it. And this liberty is so large, and has been so freely used, that apart from the express admission of transubstantiation, or of the grossly carnal notions to which it gave rise, and which, in the minds of the common people, are probably inseparable from it, I think there can hardly be any description of the real presence, which in some sense or other, is universally allowed, that would not be found to be authorized by the language of eminent divines of our Church; and I am not aware, and do not

(1) Liddon's Bampton Lectures, 1866. Lecture viii. p. 479, ed. 1868.

(2) Charge delivered by the Bishop of St. David's (1866), p. 96.

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believe, that our most advanced Ritualists have in fact overstepped those very ample bounds. (1)

Having regard to the canons as to the liberty of clergymen laid down in the judgments to which I have referred, I venture to support the position of the Bishop of St. David's with the following authorities.

Authorities as to the Construction of the Formularies relating to the Holy Eucharist.

And first let me begin with those two authorities, to whom I have already referred, and who demonstrate the identity of the present doctrine of the Church of England with that which she has maintained from Anglo-Saxon times upon the subject of the presence in the Eucharist.

I select the following passages from the famous treatise of Ratramn :—

Nunc redeamus ad illa, quorum causa dicta sunt ista; videlicet, corpus et sanguinem Christi. Si enim nulla sub figura mysterium illud peragitur, iam mysterium non rite vocitatur; quoniam mysterium dici non potest, in quo nihil est abditum, nihil à corporalibus sensibus remotum, nihil aliquo velamine contectum. At ille panis qui per Sacerdotis ministerium Christi corpus efficitur, aliud exterius humanis sensibus ostendit; et aliud interius fidelium mentibus clamat. Exterius quidem panis, quod antè fuerat, forma prætenditur, color ostenditur, sapor accipitur. Ast interius longè aliud, multoque pretiosius multoque excellentius intimatur; quia cœleste, quia divinum, id est Christi corpus ostenditur; quod non sensibus carnis; sed animi fidelis contuitu, vel aspicitur, vel accipitur, vel comeditur. Vinum quoque, quod *Sacerdotali consecratione* Christi sanguinis efficitur sacramentum, aliud superficie tenus ostendit; aliud interius continet. Quid enim aliud in superficie; quam substantia vini conspicitur? Gusta, vinum sapit; Odora, vinum redolet; Inspice, vini color intuetur. At interius si consideres, jam non liquor vini, sed liquor sanguinis Christi credentium mentibus et sapit, dum gustatur; et agnoscitur, dum conspicitur; et probatur, dum odoratur. Hœc ita esse dum nemo potest abnegare, claret; quia panis ille vinumque figuratè Christi corpus et sanguis existit. Non enim secundum quod videtur, vel carnis species nullo pane cognoscitur, vel in illo vino cruoris unda monstratur; cum tamen post mysticam consecrationem, nec panis, jam dicitur nec vinum, sed Christi corpus et sanguis. (2)

Quærendum ergo est ab eis, qui nihil hîc figuratè volunt accipere, sed totum in veritatis simplicitate consistere; secundum quod demutatio facta sit: ut iam non sint quod antè fuerunt; videlicet, panis atque vinum sed sint corpus atque sanguis Christi? Secundem speciem namque creaturæ, formamque rerum visibilium, utrunque hoc, id est, panis et vinum, nihil habent in se permutatum. (3)

(1) Charge delivered by the Bishop of St. David's (1866), pp. 97, 98.

(2) Bertrami Presbyteri De Corpore et Sanguine Domini, &c., pp. 9–11. Edition published at Geneva, 1541; see also English edition published at Dublin, 1753.

(3) Bertrami De Corpore et Sanguine Domini, &c., pp. 13, 14.

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Sicut ergo paulò ante quàm pateretur, panis substantiam et vini creaturam convertere potuit in proprium corpus quod passurum erat, et in suum sanguinem qui post fundendus extabat: sic etiam in deserto manna et aquam de petrâ in suam carnem et sanguinem convertere prævaluit quamvis longê post et caro illius in cruce pro nobis pendenda, et sanguis eius in ablutionem nostram fundendus superabat. (1)

Item consequenter: in illo sacramento Christus est: quia corpus Christi est. Non ergo corporalis esca, sed spiritualis est. Quid apertius; quid manifestius; quid divinius? Ait enim; in illo sacramento Christus est. Non enim ait ille panis et illud vinum Christus est. Quod si diceret, Christum corruptibilem (quod absit) et mortalitati subjectum predicaret. Quicquid enim in illa esca vel cernitur vel gustatur corporaliter, corruptibilitati constat obnoxium esse. Addit, quia corpus Christi est.

Insurgis et dicis, Ecce manifestè illum panem, et illum potum corpus esse Christi confitetur. Sed, attende quemadmodum subjungitur. Non ergo corporalis esca, sed spiritualis est. Non igitur sensum carnis adhibeas. Nihil enim secundum eum hîc decernitur. Est quidem corpus Christi, sed non corporale, sed spirituale. Est sanguis Christi, sed non corporalis, sed spiritualis. Nihil igitur hic corporaliter sed spiritualiter sentiendum. Corpus Christi est, sed non corporaliter, et sanguis Christi est, sed non corporaliter. (2)

Ponamus adhuc unum patris Augustini testimonium, quod et dictorum fidem nostrorum astruat, et sermonis marginem ponat. In sermone quem fecit ad populum de sacramento altaris, sic infit, Hoc quod videtis in altari Dei, jam transactâ nocte vidistis. Sed quid esset, quid sibi vellet, quam magnæ rei sacramentum contineret, nondum audistis. Quod ergo videtis, panis est, et calix, quod vobis etiam oculi vestri renuntiant: quod autem fides vestra postulat instruenda, panis, est corpus Christi; calix est sanguis Christi. Breviter quidem hoc dictum est quod fide fortè sufficiat: sed fides instructionem desiderat. Dicit enim Propheta: Nisi crediderit is, non intelligetis. Potestis ergo dicere mihi, præcepisti ut credamus: expone ut intelligam. Potest enim animo cujuspiam cogitatio talis oboriri: Dominus noster Jesus Christus novim unde acceperit carnem, de Virgine scilicet Maria, infans lactatus est, nutritus est, crevit, ad juvenilem ætatem perductus est, à Judæis persecutionem passus est, ligno suspensus est, interfectus est, de ligno depositus est, sepultus est, tertio die resurrexit, quo die voluit, in cœlum ascendit, illuc levavit corpus suum, inde venturus est judicare vivos et mortuos, ibi est modò sedens ad dexteram Patris. Quomodo panis corpus eius: et calix, vel quod habet calix; quo modo ejus est sanguis? *Ista fratres, ideo dicuntur sacramenta quia in eis aliud videtur, et aliud intelligitur.* Quod videtur, speciem habet, corporalem, quod intelligitur fructum habet spiritualem. Ista venerabilis, Author dicens, instruit nos quid de proprio corpore Domini, quod de Mariâ natum, et nunc ad dexteram Patris sedet, et in quo venturus est judicare vivos et mortuos; et quid de isto, quod super altare ponitur, et populo participatur, sentire debeamus.

(1) Bertrami Presbyteri De Corpore et Sanguine Domini, &c., pp. 23, 24. Edition published at Geneva, 1541; see also English edition published at Dublin, 1753.

(2) Bertrami Presbyteri De Corpore et Sanguine Domini, &c., pp. 40, 41. Edition published at Geneva, 1541; see also English edition published at Dublin, 1753.

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Illud integrum est, neque ullâ sectione dividitur, nec ullis figuris obvelatur. Hoc verò quod supra mensam Domini continetur, et figura est, quia sacramentum est: et exterius quod videtur speciem habet corpoream quæ pascit corpus: interius verò quod intelligitur, fructum habet spiritualem, qui vivificat animam. (1)

. . . . . .

Of this book of Bertram's, Bishop Hampden says:—

The opposition of controversy, whilst it led the orthodox to assert an actual presence of the incarnate Christ under the sacramental symbols of bread and wine, made them charge their adversaries with holding the sacraments to be only *signs*, memorials of Christ's passion, and not the actual oblation. And this may account for the pointed expression in one article, that "The Supper of the Lord is not only a *sign* of the love which Christians ought to have among themselves, but rather is a sacrament of our redemption." In denying an actual communication of Christ to the sacred emblems, it became necessary to guard against the construction of asserting a merely commemorative rite, and thus evacuating the sacrament of its holy burthen of grace. For neither Ratramn, in opposing the doctrine of Paschase, nor afterwards Berenger, in advocating the views of Erigena against Lanfranc, appear to have held that the Eucharist was *nothing more* than a sign. Ratramn, indeed, distinctly asserts a *real* presence, though he does not admit a presence of the crucified body of Christ in the consecrated bread and wine.

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(1) Bertrami Presbyteri De Corpore et Sanguine Domini, &c., pp. 61–64. Edition published at Geneva, 1541; see also English edition published at Dublin, 1753.

The learned Cave says, "*Bertramnus* rectius *Ratramnus* natione ut videtur Gallus in veteri monasterio Corbeiensi monachus et presbyter tandem favente Carolo Calvo in diœcesi Suessoniensi cœnobii præpositus. Claruit anno 840 quo circa tempore vel paulo ante ad scribendum se accinxit."

He wrote "De Virgine Dominum parturiente," "De Predestinatione," 849; et paulo post decantatissimum "illum *de Eucharistiâ* libellum in lucem emississe videtur." . . . .

"*De Corpore et Sanguine Domini* liber in quo quam apertè quam disertè de re Eucharisticâ agit et transubstantiationis dogma prout in scholis pontificiis explicatur quam dilucidè refellit, norunt quo quot vel prima theologiæ tyrocinia posuerunt."

Then he repels the calumny of the Romanists that the word was corrupt and interpolated; and speaks of Ælfric's work,—

"Adversus quot fidem faciunt tot vetusti codices et Ælfrici nostri qui anno 960 floruit homilia Paschalis ex Ratramni libello pœne *ad verbum* desumpto."

Of *Paschasius Radbertus* (Cave says) "gente Gallus natus est anno circiter 786. Prima pietatis et doctrinæ tyrocinia posuit inter monachos qui majori monialium Suessionessim cætui inserviebant," he entered under Adelard 844. "Præfecturam cœnobii Corbeiensis obtenuit."

"Primus auctor (fatente ipsomet Bellarmino de Script. Eccles. p. 226) qui serio et copiose scripsit de veritate Corporis et Sanguinis Domini in Eucharistiâ." Cave however pronounces even of Paschasius, "non pauca tradere quæ cum receptâ Ecclesiæ Romanæ doctrinâ nequaquam conveniunt." ib. 32.

It is a real and true presence that he asserts, the virtue of Christ acting in the way of efficacious assistance to the receiver of the sacrament. The Church of England doctrine of the sacraments, it is well known, is founded on the views given by this author. Cranmer and Ridley are said to have studied his work together, and to have derived their first ray of light on the subject from that study. (1)

And the Bishop of St. David's, in his charge of 1857, remarks:—

And as Paschasius and Ratramn no doubt frequently communicated at the same altar, so notwithstanding the wide divergency of their opinions, they may have done so with equal benefit to themselves. But the consequences of their dispute were not of slight moment, and are seen and felt at this day. Paschasius contributed more than any individual before Lanfranc to the preponderance of that belief which became the dogma of transubstantiation. Ratramn's treatise, as is well known, exercised a most powerful influence on the mind of Ridley, and was thus mainly instrumental in fixing the doctrine of the Church of England on the Eucharist, or rather in restoring that of the Anglo-Saxon Church, *as expounded in exact conformity to the ideas and partly in the very words of Ratramn*, by Ælfric, in the Paschal Homily, where he teaches, "This mystery is a pledge and a symbol; Christ's body is truth. This pledge we hold mystically, until we come to the truth, and then will this pledge be ended." (2)

Most justly, therefore, did Canon Hopkins observe (in the dissertation prefixed to his edition of the treatise, ed. 1868, c. 5, p. 105), that "the doctrine of Ratramn was the very same doctrine which the Church of England embraced as most consonant to Scripture and the fathers." Which is not what our adversaries would put upon us, that the sacrament of the Lord's Supper is a naked commemoration of our Saviour's death, and a mere sign of his body and blood, but an efficacious mystery, accompanied with such a divine and spiritual power as renders the consecrated elements truly, though mystically, Christ's body and blood, and communicates to us the real fruits and saving benefits of his bitter passion. And this is the doctrine of Bertram in both parts of his work. (3)

Next in order of date and importance are the works of the Anglo-Saxon Abbot of Malmesbury and St. Alban's, Ælfric, who was, perhaps, also Archbishop of Canterbury from 995 to 1005. (4) His sermon of the "Paschall Lambe" was first printed in Saxon character, and in Queen Elizabeth's reign published, as I have already said, by Archbishop Parker, and subscribed by him and his suffragans; the object being to shew that the doctrine of the Eucharist in the English Church was not an innovation upon, but a revival of, the Catholic faith.

(1) Bishop Hampden's Bampton Lectures, 1832. Lecture VII. p. 320.

(2) Mr. Thorpe's Translation, vol. ii. p. 273, printed for the Ælfric Society.

(3) Appendix to Charge of Bishop of St. David's, 1857, p. 135.

(4) Anglia Sacra, vol. i. p. 125; Lingard, Hist. and Antiq. of Anglo-Saxon Church, vol. ii. pp. 311–319.

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To the publication of this work Parker prefixed the following preface:—

As the writynges of the Fathers, even of the first age of the Churche be not thought on all parts so perfect that whatsoever thyng hath been of them spoken ought to be receaved, without all exception (which honour trulye themselves both knewe and also have confessed to be only due to the most holy and tryed work of God), so in this sermon here published some thynges be spoken not consonant to sounde doctrine, but rather to such corruption of great ignorance and superstition as hath taken root in the Church of long time, being overmuch cumbered with monckery.

As where it speaketh of the masse to be profitable to the quick and dead; of the mixture of water with wyne, and whereas here also is reportes made of ij vayne miracles . . . . with some other suspitious words sounding to superstition. But all these things that be thus of some reprehension be, as it were, but by the way touched: the full and whole discourse of all the former part of the sermon, and almost of the whole sermon is about the understanding of the sacramentall bread and wine, howe it is the bodye and bloude of Christ our Saviour, by which is revealed and made knowen what hath been the common taught doctrine of the Church of England on this behalf many hundreth years agoe contrarye to the unadvised writyng of some nowadays. Now that thys foresaid Saxon Homely with the other testimonies before alledged doe fullye agree to the olde auncient bookes (whereof some bee written in the olde Saxon and some in the Lattyne) from whence they are taken: these here underwritten upon delegent perusing and comparing the same, have found by conference that they are truly put forth in print without any adding or withdrawing anything for the more faithful reporting of the same, and therefore for the better credite thereof have subscribed their names:—

Matthewe, Archbishop of Canterbury.
Thomas, Archbishop of York.
Edmund, Bishop of London.
James, Bishop of Durham.
Robert, Bishop of Winchester.
William, Bishop of Chichester.
John, Bishop of Hereford.
Richard, Bishop of Elye.
Edwine, Bishop of Worcester.
Nicholas, Bishop of Lincoln.
Richard, Bishop of St. Davys.
Thomas, Bishop of Lichfield and Coventry.
John, Bishop of Norwich.
John, Bishop of Carlisle.
Nicholas, Bishop of Bangor.

With divers other personages of honour and credit subscribing their names, &c.

Parker entitled this book—

"A Sermon of the Paschall Lambe, and of the Sacramentall Body and Bloude of Christ our Saviour, written in the olde Saxon tounge before the Conquest, and

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appoynted in the reigne of the Saxons to be spoken unto the people at Easter before they shoulde receave the Communion, and now first translated into our common Englishe speche."

I select the following extracts:—

We Christens keep Christes resurrection as the time of Easter these vii. dayes, because, through hys sufferring and rising we be delivered and be made clean by going to this holy housel, as Christ sayth in his Gospel, "Verely, verely, I say unto you, ye have no life in you, except ye eate my flesh and drinke my bloud. He that eateth my flesh, and drinketh my bloud, abideth in me, and I in him, and hath the everlasting life; and I shall raise him up at the last day." "I am the lively bread that came down from heaven, not so as your forefathers eate the heavenlye bread in the wilderness and afterwarde dyed. He that eateth thys bread he liveth for ever." He blessed bread before his suffering, and divided it to his disciples, thus saying: "Eate this bread, it is my body, and do this in my remembraunce." Also he blessed wyne in a cuppe, and said: "Drink ye all of thys. Thys is my bloude that is shedde for many in forgeuenesse of sinnes."

The Apostles dyd as Christ commaunded, that is, they blessed bread and wine to housell agayne afterwarde in his remembrance. Even so also their successoures and all priestes by Christes commaundement doe blesse bread and wine to housell in hys name with the apostolike blessing.

Now, several men have often searched, and do yet often search, howe bread that is gathered of corne, and through fyers heated baked, may bee turned to Christes body, or how wyne that is pressed out of many grapes is turned through any blessing to the Lordes bloude.

Now, saye we to suche men, that some thinges be spoken of Christ by signification, some by things certain. . . . .

Why, then, is the holy housel called Christ's body, or his bloud, if it be not truely that it is called? Truly, the bread and the wine, which by the masse of the priest be hallowed shewe one thyng without to humayne understanding, and an other thing they call within, to belieuing mindes. Without they bee sene bread and wine both in figure and in tast: but they be truly, after the hallowing, Christe's body and hys bloude, through ghostly mistery. Beholde, nowe we see two thynges in this one creature, after true nature, the water is corruptible water, and after ghostlye misterye hath healing mighte. So also if we beholde the holye housell after bodely understanding, then we see that it is a creature corruptible and mutable: if we acknowledge therein ghostley myght, then understand we that lyfe is therein, and that it giveth immortalitie to them that eat it with beliefe; much is betwixt the invisible myghte of the holye housell, and the visible shape of hys proper nature. It is naturally corruptible bread and corruptible wine, and is by myghte of God's worde truly Christes bodye and hys bloode, not so, notwithstanding bodely but ghostley. Much is betwixt the body Christ suffered in and the bodye that is hallowed to housell; . . . . his ghostly body, which we call the housell, is gathered of many cornes, without bloude and bone, without lymme, and without soule, and, therefore, nothing is to be vnderstode therein bodelye, but all is ghostly to be vnderstode. Whatsoever is in that housell which giveth substaunce of lyfe, that is of the ghostlye

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myghte, and invisible doing—therefore is the holy housell called a misterye, because there is one thing in it seene, and another thing understode—that which is there sene, hath bodely shape, and that we do there understand, hath ghostlye might.

Certaynely Christes bodye which suffered death and rose from death, never dyeth henceforth: but is eternal and unpassible. The housell is temporall not eternall. Corruptible, and dealed into sundry parts; chewed between teeth, and sent into the bellye, howbeit, nevertheless, after ghostlye myght, it is all in every part. Manye receive the holy body: and yet, notwithstanding it is so all in every parte, after ghostly mistery; though, to some man fall a less deale, yet there is no more myghte, notwithstanding, in the more parte, than in the lesse, because it is all in each man after the invisible myght.

Thys mistery is a pledge and a figure, Christes body is truth itself. Thys pledge we do keepe mistically until that we be come to the truth itselfe, and then is this pledge ended. Truelye, it is so as we before have said, Christes bodye and hys bloude, not bodelye, but ghostlye. And ye shoulde not search how it is done, but holde it in your beliefe that it is so done. . . . .

Let us now heare the apostles wordes about this mystery; Paule the apostle speaketh of the old Israelites thus, writing in his epistle to faithfull men, "All our forefathers were baptised in the cloud and in the sea; and all they eat the same ghostlye meat, and drank the same ghostlye drink. They drank truelye of the stone that followed them, and that stone was Christ." Neither was the stone then from which the water ranne, bodely Christ, but it signifyed Christ, that calleth thus to all beleaving and faithfull men: whosoever thirsteth, let him come to me and drinke. And from his bowels floweth lyuely water! This he sayde of the Holy Ghost, whom he receiueth which beleaveth on hyme.

The Apostle Paule sayth that the Israelites did eat the same ghostly meate, and drink the same ghostly drinke: because the heavenly meate that fed them forty years, and the water which from the stone did flow, had signification of Christes bodye and his bloude, that now be offerred dayly in God's church. It was the same which we now offer, not bodely, but ghostly.

We sayd unto you, a little before, that Christ hallowed bread and wine to housell before his suffering, and sayd, this is my body, and my bloud. Yet, he had not then suffered. But so, notwithstanding, he turned through invisible might, the bread to his own body, and the wyne to his bloode, as he before did in the wilderness, before that he was borne a man, when he turned that heauenly meat to his fleshe, and the flowing water from the stone to his own bloude.

Very many ate of the heavenlye meate in the wilderness, and drank the ghostlye drink, and were nevertheless dead, as Christ sayd. And Christ ment not the death which none can escape, but the everlastynge death which some of the folke deserved for their unbeliefe.

. . . . The Saviour sayde, "He that eateth my flesh, and drinketh my blood, hath everlasting life." He bade them not to eat the body which he was encompassed with, nor the bloud to drink which he shed for us; but he meant with those wordes, the holy housell, which ghostly is his body and his bloud; and he that tasteth it with believing hart hath the eternal lyfe. In the old law faithful men offred to God divers sacrifises, that had foresignification of Christes

body, which for our sinnes he himselfe to his heavenly father hath since offred as a sacrifice. (1)

I will now refer to the letter of Ælfric, already mentioned, to Wulfstone, Archbishop of York, also translated into English in the reign of Elizabeth, and commented upon by the learned Dr. Routh, as a valuable illustration of the Church's doctrine as to the eucharist:—

Christ himselfe blessed housell before his suffring. He blessed the bread and brake thus speaking to his apostles: "*Eate this bread, it is my body.*" And agayne he blessed one chalice with wyne and thus also speaketh vnto them: "*Drinke ye all of this, it is myne own bloude of the Newe Testament which is shed for many in forgeuenes of synnes.*" The Lord which halowed housel before his suffering and sayeth that the bread was his owne body and that the wyne was truly his bloud, he haloweth dayly by the hands of the prist bread to his body, and wyne to his bloud in ghostly mystery, as we read in bokes. And yet that liuely bread is not bodely so notwithstanding: not the self same body that Christ suffered in. Nor that holy one is the Saviour's bloud which was shed for vs in bodely thing, but in ghostly vnderstanding. Both be truly that bread hys body, and that wyne also hys bloud, as was the heauenly bread, which we call manna, that fed forty yeres God's people. And the cleare water which did then runne from the stone in the wilderness, was truly his bloud, as Paul wrote on summe of his epistles." (2)

The next authority to which I refer is that of Bishop Ridley. In his examination at Oxford it was articled against him:—

First, that thou Nicholas Ridley, in this high university of Oxford, anno 1554, in the months of April, May, June, July, or in some one or more of them, hast affirmed, and openly defended and maintained, and in many other times and places besides, that the true and natural body of Christ, after the consecration of the priest, is not really present in the sacrament of the altar.

To this Ridley answers:—

In a sense the first article is true, and in a sense it is false; for if you take *really*, for *vere*, for spiritually, by grace and efficacy, then it is true that the natural body and blood of Christ is in the sacrament *vere et realiter*, indeed and really; but if you take these terms so grossly that you would conclude thereby a natural body having motion to be contained under the forms of bread and wine,

(1) A Sermon of the Paschall Lambe, etc. Lumley, 1849. Also printed in Homilies of the Anglo-Saxon Church, Mr. Thorpe's Translation, vol. ii. p. 277, printed for the Ælfric Society, 1846.

(2) Ex Aelfrici Epistola ad Wulfstanum Archiepiscopum Eboracensum, Saxonice scripta; in Anglicam linguam, regnante Elizabetha, in Latinam vero, interprete Abrahamo Wheloco, conversa. Routh, Scriptorum Ecclesiasticorum Opuscula, vol. ii. pp. 169–175.

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vere et realiter, then really is not the body and blood of Christ in the sacrament, no more than the Holy Ghost is in the element of water in our baptism.

The answer being cavilled at, he added this explanation:—

For both you and I agree herein, that in the sacrament is the very true and natural body and blood of Christ, even that which was born of the Virgin Mary, which ascended into heaven, which sitteth on the right hand of God the father, which shall come from thence to judge the quick and the dead; only we differ *in modo*, in the way and manner of being; we confess all one thing to be in the sacrament, and dissent in the manner of being there. I, being fully by God's word thereunto persuaded, confess Christ's natural body to be in the sacrament indeed by spirit and grace, because that whosoever receiveth worthily that bread and wine receiveth effectuously Christ's body, and drinketh his blood (that is, he is made effectually partaker of his passion); and you make a grosser kind of being, enclosing a natural, a lively, and a moving body, under the shape or form of bread and wine. Now, this difference considered, to the question thus I answer, that in the sacrament of the altar is the natural body and blood of Christ *vere et realiter*, indeed and really, for spiritually, by grace and efficacy; for so every worthy receiver receiveth the very true body of Christ. But if you mean really and indeed, so that thereby you would include a lively and a moveable body under the forms of bread and wine, then, in that sense is not Christ's body in the sacrament really and indeed.

The second article of charge against him is:—

(2.) Item, that in the year and months aforesaid thou hast publicly affirmed and defended, that in the sacrament of the altar remaineth still the substance of bread and wine.

Ridley says:—

In the sacrament is a certain change, in that bread which was before common bread is now made a lively presentation of Christ's body, and not only a figure, but effectuously representeth his body; that even as the mortal body was nourished by that visible bread, so is the natural soul fed with the heavenly food of Christ's body, which the eyes of faith see, as the bodily eyes see only bread. Such a sacramental mutation I grant to be in the bread and wine, which truly is no small change, but such a change as no mortal man can make, but only that omnipotency of Christ's word. (1)

From his disputation at Oxford I extract the following passages:—

He that sitteth there is here present by mystery and grace; and that is holden of the godly, such as communicate here, not only sacramentally with the hand of the body, but, much more wholesomely, with the hand of the heart, and by inward drinking is received, but by the sacramental signification is holden of all men." . . . . (2)

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(1) Ridley's Works, pp. 271–4.

(2) Ridley's Works, p. 223.

I grant the bread to be converted and turned into the flesh of Christ; but not by transubstantiation, but by sacramental converting or turning. "It is transformed," saith Theophylact, in the same place, "by a mystical benediction, and by the accession or coming of the Holy Ghost unto the flesh of Christ." He saith not by expulsion or driving away the substance of bread, and by substituting or putting in its place the corporal substance of Christ's flesh. And whereas he saith, "It is not a figure of the body," we should understand that saying, as he himself does elsewhere, add "only," that is, it is no naked or bare figure *only*. For Christ is present *in* the mysteries; neither at any time as Cyprian saith, doth the Divine Majesty abstract himself from the divine mysteries. . . . . (1)]

And in answer to the following argument of Curtop:—

That which is in the cup is the same that flowed from the side of Christ.
But true and pure blood did flow from the side of Christ:
Ergo, his true and pure blood is in the cup,—

Ridley says,—"It is his true blood which is in the chalice, I grant, and the same which sprang from the side of Christ. But how? It is blood indeed, but not after the same manner, after which manner it sprang from his side. For here is the blood, but by way of a sacrament. Again, I say, like as the bread of the sacrament and of thanksgiving is called the body of Christ given for us; so the cup of the Lord is called the blood which sprang from the side of Christ; but that sacramental bread is called the body, because it is the sacrament of his body. Even so likewise the cup is called the blood also which flowed out of Christ's side, because it is the sacrament of that blood which flowed out of his side, instituted of the Lord himself for our singular commodity, namely, for our spiritual nourishment; like as baptism is ordained in water to our spiritual regeneration."

Curtop.—"The sacrament of the blood is not the blood."

Ridley.—"The sacrament of the blood is the blood; and that is attributed to the sacrament, which is spoken of the thing of the sacrament."

. . . . . .

Weston.—"That is very well. Then we have blood in the chalice."

Ridley.—"It is true; but by grace, and in a sacrament."

From the homily concerning the sacrament, the first part, I take this passage:—

Neither need we to think that such exact knowledge is required by every man, that he be able to discuss all high points in the doctrine thereof; but thus much we must be sure to hold, that in the supper of the Lord there is no vain ceremony, no bare sign, no untrue figure of a thing absent. (Matt. xxvi.) But, as the Scripture saith, the table of the Lord, the bread and cup of the Lord, the memory of Christ, the annunciation of his death, yea, the communion of the body and blood of the Lord, in a marvellous incorporation, which, by the operation of the Holy Ghost (the very bond of our conjunction with Christ), is through faith wrought in the souls of the faithful, whereby not only their souls live to eternal life, but they surely trust to win to their bodies a resurrection to immortality. (1 Cor. x.) The true understanding of this fruition and union, which is betwixt

(1) Ridley's Works, pp. 229, 230.

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the body and the head, betwixt the true believers and Christ, the ancient Catholic fathers, both perceiving themselves and commending to their people, were not afraid to call this supper, some of them, the salve of immortality and sovereign preservative against death; others, a deifical communion; others, the sweet dainties of our Saviour, the pledge of eternal health, the defence of faith, the hope of the resurrection; others, the food of immortality, the healthful grace, and the conservatory to everlasting life. Iren. lib. iv. cap. 34; Ignat. Epist. ad Ephes. Dionysius, Origen, Optat.; Cyp. de Cœna Domini; Atha. de Pec. in Spir. Sanct. All which sayings, both of the Holy Scripture and godly men, truly attributed to this celestial banquet and feast, if we would often call to mind, oh! how would they inflame our hearts to desire the participation of these mysteries, and oftentimes to covet after this bread; continually to thirst for this food! Not as especially regarding the terrene and earthly creatures which remain, but always holding fast and cleaving by faith to the Rock, whence we may suck the sweetness of everlasting salvation.

In Jewel's "Apology" I find these expressions:—

Panem et vinum dicimus esse sana et cœlestia mysteria corporis et sanguinis Christi, et illis Christum ipsum, verum panem æternæ vitæ sic nobis præsentem exhiberi, ut ejus corpus, sanguinemque per fidem vere sumamus.

And again:—

. . . . Nec tamen cum ista dicimus, extenuamus Cœnam Domini, aut eam frigidam tantum cæremoniam esse docemus, et in eâ nihil fieri, quod multi nos docere calumniantur. Christum enim aperimus, vere *sese præsentem exhibere in sacramentis suis*, in baptismo ut eam induamus; in Cœnâ, ut eum fide et spiritu comedamus, et de ejus cruce ac sanguine habeamus vitam æternam; idque dicimus non perfunctorie, et frigide, *sed re ipsâ et vere* fieri. . . . . Christus ipse totus quantus quantus est, offertur et traditur.

Bishop Overall, in his "Additional Notes to the Book of Common Prayer," on the words "That we, receiving these thy creatures of bread and wine, &c., may be partakers of his blessed body and blood," says:—

Together with the hallowed elements of the bread and wine, we may receive the body and blood of Christ, which are truly exhibited in this sacrament, the one as well as the other.

These words, as I once conferred with a Papist, were mightily excepted against, because forsooth they must acknowledge no bread and wine, but a desition of the nature and being of both. My answer was, that here we term them so before consecration; after that we call them so no more, but abstain from that name, because our thoughts might be wholly taken up with the spiritual food of Christ's body and blood. So in the thanksgiving following we say, *That hast vouchsafed to feed us who have duly received these holy mysteries, with the spiritual food of the most precious body and blood of thy Son, &c.* In the meanwhile we deny not the bread and wine to remain there still as God's creatures. And I wonder the Papists should so contend for this same *desitio panis et vini*, whenas, in their

own service or mass, they abstain not from these words, THY CREATURES, after consecration, as we do. See the book, PER QUEM OMNIA DOMINE BONE CREAS! A certain argument that the Church of Rome never meant to teach that doctrine, which private men, the late doctors and schoolmen, have brought up and propagated. (1)

And on the words "And if any of the bread and wine," &c. :—

It is confessed by all divines that upon the words of the consecration, the body and blood of Christ is really and substantially present, and so exhibited and given to all that receive it, and all this not after a physical and sensible, but after an heavenly and incomprehensible manner. But there yet remains this controversy amongst some of them, whether the body of Christ be present only in the use of the sacrament and in the act of eating, and not otherwise. They that hold the affirmative, as the Lutherans (in Confess. Sax.) and all Calvinists, do seem to me to depart from all antiquity, which places the presence of Christ in the virtue and benediction used by the priest, and not in the use of eating the sacrament. (2)

George Herbert, who has been called "the saintly," says :—

The country parson, having to administer the sacrament, is at a stand with himself how or what behaviour to assume for so holy things. Especially at communion time he is in great confusion, as being not only to receive God, but to break and administer Him. Neither finds he any issue in this, but to throw himself down at the throne of grace, saying, Lord, thou knowest what thou didst, when thou appointedst to be done thus, therefore do thou fulfil what thou didst appoint, for thou art not only the feast, but the way to it.—(*Priest to the Sacrament.*)

Archbishop Laud, in his memorable contest with the Papist Fisher, observes :—

And for the Church of England, nothing is more plain than that it believes and teaches the true and real presence of Christ *in* the eucharist.

And again :—

As for the learned of those zealous men that died for this cause in Queen Mary's days, they denied not the real presence simply taken, but as their opposites forced transubstantiation upon them, as if that and the real presence had been all one. Whereas all the ancient Christians ever believed the one, and none but modern and superstitious Christians believe the other. . . . . Nay, Archbishop Cranmer comes more plainly and more home to it than Frith. "For if you understand," saith he, "by this word really, *reipsâ;* that is in very deed and effectually; so Christ, by the grace and efficacy of his passion, is indeed and truly present, &c. But if by this word *really* you understand *corporaliter*, corporally in his *natural* and *organical* body, under the forms of bread and wine, it is contrary to the holy word of God." And so likewise Bishop Ridley. Nay, Bishop

(1) Appendix to Nicholls on the Book of Common Prayer.

(2) Appendix to Nicholls on the Book of Common Prayer.

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Ridley adds yet further, and speaks so fully to this point, as I think no man can add to his expression; and it is well if some Protestants except not against it. "Both you and I," saith he, "agree in this; that in the sacrament is the very true and natural body and blood of Christ, even that which ascended into heaven, which sits on the right hand of God the Father, and which shall come from thence to judge the quick and the dead; only we differ *in modo*, in the way and manner of being. We confess all one thing to be in the sacrament, and dissent in the manner of being there. I confess Christ's natural body to be in the sacrament by spirit and grace, &c. You make a grosser kind of being inclosing *a natural body* under the shape and form of bread and wine." So far and more, Bishop Ridley. And Archbishop Cranmer confesses that he was indeed of another opinion, and inclining to that of Zuinglius, till Bishop Ridley convinced his judgment and settled him in this point. . . . . (1)

Bishop Andrewes, in his answer to Bellarmine, says:—

The Cardinal is not, unless "willingly, ignorant," that Christ hath said, "This is my body," not "This is my body *in this mode*." Now about the object we are both agreed; all the controversy is about the *mode*. The "this is" we firmly believe; that "it is in this mode" (the bread, namely, being transubstantiated into the body), or of the mode whereby it is wrought, that "it is," whether *in*, or *with*, or *under*, or *transubstantiated*, there is not a word in the Gospel. And because not a word is there, we rightly detach it from being a matter of faith; we may place it amongst the decrees of the schools, not among the articles of faith. What Durandus is reported to have said of old (Neand. Synop. Chron., p. 203) we approve of. "We hear the word, feel the effect, know not the manner, believe the presence." The presence, I say, we believe, and that no less true than yourselves. Of the mode of the presence we define nothing rashly, nor, I add, do we curiously inquire; no more than how the blood of Christ cleanseth us in our baptism; no more than how in the incarnation of Christ the human nature is united into the same person with the divine. (2)

Again:—

And I may safely say it with good warrant from those words especially and chiefly, which as He himself saith of them, are "spirit and life," even those words, which joined to the elements make the blessed sacrament. (2)

And again:—

All witnesses testify in favour of mutation, immutation, transmutation, but there is no mention of *substantial*, or of substance. Nor do we deny the preposition *trans*, and we acknowledge the *elements* to be *transmuted*. But we seek in vain for *substantial*. Nor do we deny that the elements are changed by the benediction, so that the consecrated bread is not that which nature has formed, but that which the benediction has consecrated, and even changed by consecration. And we believe with Nyssen *that the nature of the bread and wine was changed*, but neither he nor we to be *transubstantiated*. (2)

(1) *Laud* v. *Fisher*, Cardwell's Ed. Oxford, 1839, pp. 245–49.

(2) Responsio ad Apologiam Card. Bellarmin, (Library of Anglo-Catholic Theology), p. 11.

Donne says:—

Beloved in the blessed, and glorious, and mysterious sacrament of the body and blood of Christ Jesus, thou seest *Christum Domini*, the Lord's salvation, and thy salvation, and that thus far with bodily eyes, that bread which thou seest after the consecration is not the same bread which was presented before, not that it is transubstantiated to another substance, for it is bread still (which is the heretical riddle of the Roman Church, and Satan's sophistry, to dishonour miracles by the assiduity, and frequency, and multiplicity of them), but that it is severed and appropriated by God in that ordinance to another use. It is other bread; so as a judge is another man upon the bench than he is at home in his own house.

. . . . . .

Luther (speaking of the Roman Church) infers well, that since miracles are so easy and cheap, and obvious to them, as they have induced a miraculous transubstantiation, they might have done well to have procured one miracle more, a trans-accidentation, that since the substance is changed, the accidents might have been changed too, and since there is no bread, there might be no dimensions, no colour, no nourishing, no other qualities of bread neither, for, these remaining, there is rather an annihilation of God, in making him no God by being a contradictory God, than an annihilation of the bread, by making that which was formerly bread, God himself, by that way of transubstantiation.

But yet though this bread be not so transubstantiated, *we refuse not the words of the fathers*, in which they have expressed themselves in this mystery. Not Irenæus' *est corpus*, that that bread is his body now, not Tertullian's *fecit corpus*, that that bread is made his body which was not so before, not St. Cyprian's *mutatus*, that that bread is changed, not Damascen's *supernaturaliter mutatus*, that that bread is not only changed so in the use, as when at the king's table certain portions of bread are made bread of essay, to pass over every dish whether for safety or for majesty; not only so civiily changed; but *changed supernaturally*; no nor Theophylact's *transformatus est* (which seems to be the word that goes farthest of all), for this transforming cannot be intended of the outward form and fashion, for that is not changed; but be it of that internal form, which is the very essence and nature of the bread, so it is transformed, so the bread hath received a new form, a new essence, a new nature, because whereas the nature of bread is but to nourish the body, the nature of this bread now is to nourish the soul, and therefore, *Cum non dubitavit Dominus dicere, hoc est corpus meum, cum signum daret corporis*, since Christ forbore not to say, this is my body, when he gave the sign of his body, why we should forbear to say of that bread, This is Christ's body, which is the sacrament of his body. (1)

Bishop Cosin, who was one of the Convocation committee which prepared our present prayer-book, and who wrote the "History of Transubstantiation," observes in it:—

3. We believe *a presence and union of Christ with our soul and body, which we know not how to call better than sacramental, that is, effected by eating*; that

(1) Donne's Works, vol. I. pp. 73, 74, 75.

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while we eat and drink the consecrated bread and wine, we eat and drink therewithal the body and blood of Christ, not in a corporal manner but some other way, incomprehensible, known only to God, which we call *spiritual;* for if with St. Bernard and the fathers a man goes no further, we do not find fault with a general explication of the manner, but with the presumption and self-conceitedness of those who boldly and curiously inquire what is a spiritual presence, as presuming they can understand the manner of acting of God's holy spirit. We contrarywise confess with the fathers, that this manner of presence is unaccountable, and past finding out, not to be searched and pried into by reason, but believed by faith. And if it seems impossible that the flesh of Christ should descend, and come to be our food, through so great a distance, we must remember how much the power of the Holy Spirit exceeds our sense and our apprehensions, and how absurd it would be to undertake to measure his immensity by our weakness and narrow capacity, and so make our faith to conceive and believe what our reason cannot comprehend.

4. Yet our faith doth not cause or make that presence, but apprehends it as most truly and really effected by the word of Christ; and the faith whereby we are said to eat the flesh of Christ, is not that only whereby we believe that he died for our sins (for this faith is required and supposed to precede the sacramental manducation), but more properly, that whereby we believe those words of Christ, "This is my body;" which was St. Austin's meaning when he said, "Why dost thou prepare thy stomach and thy teeth? Believe and thou hast eaten." For in this mystical eating, by the wonderful power of the Holy Ghost, we do invisibly receive the substance of Christ's body and blood, as much as if we should eat and drink both visibly.

5. The result of all this is, *that the body and blood of Christ are sacramentally united to the bread and wine*, so that Christ is truly given to the faithful; and yet is not to be here considered with sense or worldly reason, but by faith, resting on the words of the Gospel. Now it is said, that the body and blood of Christ are joined to the bread and wine, because that in the celebration of the holy eucharist, the flesh is given together with the bread, and the blood together with the wine. All that remains is, that we should with faith and humility admire this high and sacred mystery, which our tongue cannot sufficiently explain, nor our heart conceive. (1)

With respect to the citation of Cosin's from St. Augustine, "Believe and thou hast eaten," it is to be remarked that in the office of "the Communion of the Sick," the Rubric provides that if for any just impediment (several of which are specified), a man "do not receive the sacrament of Christ's body and blood, the curate shall instruct him, that if he do truly repent him of his sins, and steadfastly believe that Jesus Christ hath suffered death upon the cross for him, and shed his blood for his redemption, earnestly remembering the benefits he hath thereby, and giving

(1) Bishop Cosin, History of Popish Transubstantiation, ch. iii., s. 5, p. 171. (Oxford Trans.)

him hearty thanks therefore, he doth eat and drink the body and blood of our Saviour Christ profitably to his soul's health, although he do not receive the sacrament with his mouth."

Our prayer-book follows in this, as in many other respects, the Salisbury missal which borrows the words of St. Augustine, "crede et manducasti."

The insertion of these words in the Salisbury Missal seems to confirm the opinion of Mr. Keble, who suggests in the preface to his edition of "Hooker's Works," that the Rubric can be meant only "for rare and extraordinary cases, cases as strong in regard of the eucharist, as that of martyrdom, or the premature death of a well-disposed catechumen, in regard of baptism." (1)

I return to the language of Cosin:—

So then (to sum up this controversy by applying to it all that hath been said), it is not questioned whether the body of Christ be absent from the sacrament duly administered according to his institution, which we Protestants neither affirm or believe; for, it being given and received in the communion, *it must needs be that it is present, though in some manner veiled under the sacrament, so that of itself it cannot be seen.* Neither is it doubted or disputed whether the bread and wine, by the power of God and a supernatural virtue, be set apart and fitted for a much nobler use, and raised to a higher dignity, than their nature bears; for we confess the necessity of a supernatural and heavenly change, and that the signs cannot become sacraments but by the infinite power of God, whose proper right it is to institute sacraments in his church, being able alone to endue them with virtue and efficacy. Finally, we do not say that our blessed Saviour gave only the figure and sign of his body, *neither do we deny a sacramental union of the body and blood of Christ with the sacred bread and wine, so that both are really and substantially received together*, but (that we may avoid all ambiguity) we deny that, after the words and prayer of consecration, the bread should remain bread no longer, but should be changed into the substance of the body of Christ, nothing of the bread but only the accidents continuing to be what they were before. And so the whole question is concerning the transubstantiation of the outward elements, whether the substance of the bread be turned into the substance of Christ's body, and the substance of the wine into the substance of his blood; or, as the Romish doctors describe their transubstantiation, whether the substance of bread and wine doth utterly perish, and the substance of Christ's body and blood succeed in their place, which are both denied by Protestants. (2)

. . . . I was the more willing to be long in transcribing these things at large, out of public confessions of churches and the best of authors, that it might the better appear how injuriously Protestant divines are calumniated by others unacquainted with their opinions, as though by these words "spiritually" and

(1) Hooker's Works, vol. i., preface, page 87.

(2) History of Transubstantiation ch. iv. s. 6, p. 175.

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"sacramentally" they did not acknowledge a true and well understood *real* presence and communication of the body and blood of Christ *in* the blessed sacrament. Whereas on the contrary they do professedly own it in terms as express as any can be used. (1)

Bishop Forbes, Professor of Hebrew at Oxford and Bishop of Edinburgh in 1633, wrote a very careful and learned treatise on ecclesiastical matters, which he entitled "Considerationes Modestæ et Pacificæ." He says:—

Tutissima et rectissima videtur illorum Protestantium, aliorumque sententia, qui corpus et sanguinem Christi vere, realiter, et substantialiter in eucharistia adesse, et sumi existimant, imo firmissime credunt, sed modo humano ingenio incomprehensibili, ac multo magis inexorabili, soli Deo noto, et in scripturas nobis non revelato, non quidem corporali, et per oralem sumptionem, sed neque etiam solo intellectu, ac pura puta fide, sed alia ratione, soli Deo, ut dictum est, cognito, illiusque omnipotentiæ relinquenda.

. . . . . .

In cœna enim per admirabilem virtutem spiritus sancti, invisibiliter substantiæ corporis Christi communicamus, cujus participes efficimur, haud secus ac si visibiliter panem et sanguinem ejus ederemus et biberemus. In baptismo lavacrum est, sed hic alimentum. Baptismus ingressus est in Ecclesiam. Coena nutrimentum in ecclesiâ et conservatio. Baptismus est salus, sacramentum corporis Christi vita (ut ait Aug. De Peccatorum Merit. et Remiss. lib. 1, c. 24. Vide P. Picherellum de Missa, pp. 208 et 210), et ad mysticam manducationem verum Christi corpus non tantum animæ, sed etiam corpori nostro, spiritualiter tamen, hoc est, non corporaliter, exhibetur, et sane alio ac diverso, *nobisque propinquiori modo, licet occulto*, quam per solam fidem: (ut recte Arch. Spalat. ubi supra, p. 237). "Et licet Johan. cap. 6 de esu sacramenti non agat, etc. inquit P. Picher., p. 193, tamen de eâdem carnis Christi manducatione spirituali, mysticaque cum Christo conjunctione; illic certe per fidem de conjunctionis initio; in sacramento autem conjunctionis majore propinquitate, augmento, confirmatione, et strictiore arctioreque vinculo loquitur." Et fides qua proprie Christi caro in eucharistiâ spiritualiter, h.e. incorporaliter, manducatur non est ea sola, ut quidam dicunt, qua Christus pro peccatis nostris crucifixus et mortuus creditur; Ea enim fides præsupponitur quidem et prærequiritur sacramentali manducationi sed non est ejus propria; sed ea fides est qua creditur verbo Christi dicentis, Hoc est corpus meum, etc. *Credere enim Christum ibi esse præsentem*, etiam carne vivificatrice, et desiderare eam sumere, nimirum hoc est spiritualiter et recte eam manducare in eucharistia: unde Aug. super Joan. tract 25. Quid paras dentem et ventrem? crede et manducasti, etc. ut doctiores norunt et notant.

Denique gravissime erratur, quando Christum non esse realiter in eucharistia, hisce ratiunculis urgetur. Christus est in coelo, loco circumscriptus, etc. igitur non est reipsa vel realiter in eucharistia. Nemo enim sanæ mentis, Christum e coelo vel e dextra patris descendere visibiliter aut invisibiliter, ut in coena vel

(1) History of Transubstantiation, ch. ii. s. 21, pp. 168–9.

siquis localiter, adsit, existimat. Fideles omnes unanimi consensu et uno ore profitentur se firmiter retinere articulos fidei, Ascendit in coelos, sedet ad dextram Patris, et modum hujus præsentiæ credere se non esse naturalem, corporalem, carnalem, localem per se, etc., absque ulla tamen coelorum desertione, sed supernaturalem, vide scripta Buceri Anglica, p. 548, etc. Nimis tamen audacter quamplurimi, multis retro sæculis, atque imprimis hoc nostro rixosissimo; nimis inquam audacter, imo plus satis crasse et materialiter de præsentiæ modo loquuti sunt, hodieque loquuntur, quem nos infinitæ Dei sapientiæ et potentiæ omnino relinquendum censemus. (1)

Jackson, President of Corpus Christi College, Oxford, and Dean of Peterborough (1638), perhaps the most learned of our divines, says:—

This distillation of life, and immortality from his glorified human nature, is that which the ancient and orthodoxal Church did mean in their figurative and lofty speeches of Christ's real presence, or of eating his very flesh, and drinking his very blood in the sacraments. And the sacramental bread is called *his body*, and the sacramental wine *his blood*, as for other reasons, so especially for this, that the *virtue* or influence of his bloody sacrifice—the distinction to which I have adverted must be here borne in mind between the *res* and the *virtus sacramenti*—is most plentifully and most effectually distilled from heaven unto the worthy receivers of the eucharist, and unto this point and no further will most of the testimonies reach, which Bellarmine in his books of the sacrament, or Maldonate in his Comments upon the Sixth of John, do quote out of the fathers for Christ's real presence by transubstantiation; or which Chemnitius, that learned Lutheran, in his books, "De duabus in Christo Naturis," and "De Fundamentis sanæ Doctrinæ," doth avouch for consubstantiation. And if this much had been as distinctly granted to the ancient Lutherans, as Calvin in some places doth, the controversy between the Lutheran and other reformed churches had been at an end when it first began; both parties acknowledging St. Cyril to be the fittest umpire in this controversy. (2)

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One of the most important writings of St. Cyril, to whom Dr. Jackson refers, is his letter written to Nestorius, which was afterwards the basis of the decree of the Council of Ephesus (A.D. 431), which Council condemned the heresy of Nestorius with respect to the human nature of our Lord. One of the arguments adduced in this letter for the true doctrine is derived from the admitted presence and partaking of our Lord's body in the holy eucharist; and the distinction is established between the body of our Lord, which is life-giving, and the body of a man, however holy, which is not.

(1) Considerationes Modestæ et Pacificæ. Ed. 1658, pp. 374, 387. Library of Anglo-Catholic Theology, vol. ii. p. 420.

(2) Jackson's Works, vol. x. pp. 41–2. (Oxford Edition, 1844.)

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The whole passage is as follows. It is one of those collected by the learned Dr. Routh in his work intended to shew the close connexion between our Church and the Primitive Church, and deserves careful consideration:—

Ἀναγκαίως δὲ κἀκεῖνο προσθήσομεν· καταγγέλλοντες γὰρ τὸν κατὰ σάρκα θάνατον τοῦ μονογενοῦς Υἱοῦ τοῦ Θεοῦ, τουτέστιν Ἰησοῦ Χριστοῦ, τήν τε ἐκ νεκρῶν ἀναβιώσιν, καὶ τὴν εἰς οὐρανοὺς ἀνάληψιν ὁμολογοῦντες, τὴν ἀναίμακτον ἐν ταῖς Ἐκκλησίαις τελοῦμεν θυσίαν· πρόσιμέν τε οὕτω ταῖς μυστικαῖς εὐλογίαις καὶ ἁγιαζόμεθα, μέτοχοι γενόμενοι τῆς τε ἁγίας σαρκὸς, καὶ τοῦ τιμίου αἵματος τοῦ πάντων ἡμῶν Σωτῆρος Χριστοῦ, καὶ οὐχ ὡς σάρκα κοινὴν δεχόμενοι· μὴ γένοιτο· οὔτε μὴν ὡς ἀνδρὸς ἡγιασμένου, καὶ συναφθέντος τῷ Λόγῳ κατὰ τὴν ἑνότητα τῆς ἀξίας, ἤγουν ὡς θείαν ἐνοίκησιν ἐσχηκότος, ἀλλ' ὡς ζωοποιὸν ἀληθῶς, καὶ ἰδίαν αὐτοῦ τοῦ Λόγου. Ζωὴ γὰρ ὢν κατὰ φύσιν ὡς Θεὸς, ἐπειδὴ γέγονεν ἓν πρὸς τὴν ἑαυτοῦ σάρκα, ζωοποιὸν ἀπέφηνεν αὐτὴν ὥστε κἂν λέγῃ πρὸς ἡμᾶς, Ἀμὴν ἀμὴν λέγω ὑμῖν, ἐὰν μὴ φάγητε τὴν σάρκα τοῦ Υἱοῦ τοῦ ἀνθρώπου, καὶ πίητε αὐτοῦ τὸ αἷμα,' οὐχ ὡς ἀνθρώπον τῶν καθ' ἡμᾶς ἑνὸς καὶ αὐτὴν εἶναι λογιούμεθα, πῶς γὰρ ἡ ἀνθρώπου σὰρξ ζωοποιὸς ἐσται κατὰ φύσιν τὴν ἑαυτῆς; ἀλλ' ὡς ἰδίαν ἀληθῶς γενομένην τοῦ δί ἡμᾶς καὶ υἱοῦ καὶ ἀνθρώπου γεγονότος τε καὶ χρηματίσαντος. (Z.) (1)

The Council of Ephesus is one of the "first four general councils" referred to in 1 Eliz. c. 1, s. 35.

Bishop Ken, whose name needs no introduction, in his exposition of the Church Catechism, uses this language:—

As to "parts outward."

Glory be to thee, O adorable Jesus, who, under the outward and visible part, the "bread and wine," things obvious and easily prepared, both which "thou hast commanded to be" received, dost communicate to our souls the mystery of divine love, "the inward and invisible grace," thy own most blessed "body and blood which are verily and indeed taken and received by the faithful in thy Supper;" for which all love, all glory, be to thee.

As to "real presence."

I believe, O crucified Lord, that "the bread which we break," in the celebration of the holy mysteries, is the communication of thy body, and the cup of blessing which we bless is the communication of thy blood; and that thou dost as effectually and really convey thy body and blood to our souls by the bread and wine, as thou didst thy Holy Spirit, by thy breath and thy disciples; for which all love, all glory, be to thee.

Lord, what need I labour in vain to search out the manner of thy mysterious presence in the Sacrament, when my love assures me thou art there? All the faithful who approach thee with prepared hearts, they well know thou art there; they feel the virtue of divine love going out of thee to heal their infirmities and to inflame their affections; for which all love, all glory, be to thee.

O holy Jesus, when at thy altar I see the bread broken and the wine poured

(1) Routh, Scriptorum Ecclesiastiorum Opuscula, vol. i. p. 25.

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out, "O teach me to discern thy body there;" O let those sacred and significant actions create in me a most lively remembrance of thy sufferings; how thy most blessed body was scourged, and wounded, and bruised, and tormented; how thy most precious blood was shed for my sins, and set all my powers on work to love thee, and to celebrate thy love in thus dying for me. (1)

Bishop Jeremy Taylor, whose authority was much relied on by counsel for the promoter, says:—

Some so observe the literal sense of the words that they understand them also in a natural: some so alter them by metaphors and preternatural significations, that they will not understand them at all in a proper way. We see it, we feel it, we taste it, and we smell it to be bread; and by philosophy we are led into a belief of that substance whose accidents these are, as we are to believe that to be fire which burns, and flames, and shines. But Christ also affirmed concerning it, *This is my body;* and if faith can create an assent as strong as its object is infallible, or can be as certain in its conclusions as sense is certain in its apprehensions, we must at no hand doubt but that it is Christ's body. Let the sense of that be what it will, so that we believe those words and (whatsoever that sense is which Christ intended) that we no more doubt in our faith than we do in our sense, and then our faith is not reprovable. It is *hard* to do so much violence to our *sense* as not to think it *bread;* but it is more *unsafe* to do so much violence to our *faith* as not to believe it to be Christ's body. But it would be considered that no interest of religion, no saying of Christ, no reverence of opinion, no sacredness of the mystery is disavowed, if we believe both what *we hear* and what *we see.* He that believes it to be *bread*, and yet *verily* to be *Christ's body*, is only tied also by implication to believe God's omnipotence, that he who affirmed it can also verify it. And they that are forward to believe the change of substance can intend no more, but that it be believed verily to be the body of our Lord. And if they think it impossible to reconcile its being bread with the verity of being Christ's body, let them remember that themselves are put to more difficulties, and to admit of more miracles, and to contradict more sciences, and to refuse the testimony of sense, in affirming the special manner of transubstantiation. And therefore it were safer to admit the words in their first sense, in which we shall no more be at war with reason, nor so much with sense, and not at all with faith. And for persons of the contradictory persuasion, who to avoid the natural sense, affirm it only to be figurative, since their design is only to make this sacrament to be Christ's body in the sense *of faith*, and not *of philosophy*, they may remember that its being really present does not hinder, *but that all that reality may be spiritual;* and if it be Christ's body, so it be not affirmed such in a natural sense and manner, it is still only the object of faith and spirit; and if it be affirmed only to be spiritual, there is then no danger to faith in admitting the words of Christ's institution, *This is my body.* I suppose it to be a mistake to think whatsoever is real must be natural, and it is no less to think spiritual to be only figurative; that is too much, and this is too little; philosophy and faith may well be reconciled, and whatsoever objection can invade this union may be cured by modesty.

(1) Ken's Prose Works, p. 324.

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And again :—

In the sacrament that body which is reigning in heaven is exposed upon *the table of blessing*, and his body which was broken for us is now broken again, and yet remains impassable. Every consecrated portion of bread and wine does exhibit Christ entirely to the faithful receiver, and yet Christ remains one, while he is wholly ministered in ten thousand portions; so long as we call these mysteries, and make them intricate to exercise our faith, and to represent the wonder of the mystery, and to increase our charity, our being inquisitive into the abyss can have no evil purposes. God hath instituted the rite in visible symbols to make the secret grace as presential and discernible as it might, that by an instrument of sense our spirits might be accommodated as with an exterior object to produce an internal act. But it is the prodigy of a miraculous power by instruments so easy to produce effects so glorious; this, then, is the object of *wonder* and *adoration*. (1)

And again :—

This may suffice for the word "real," which the English Papists much use, but, as it appears, with much less reason than the sons of the Church of England; and when the real presence is denied, the word "real" is taken for "natural," and does not signify "transcendenter," or in his just and most proper signification. But the word "substantialiter" is also used by Protestants in this question, which, I suppose, may be the same with that which is in the Article of Trent, "Sacramentaliter præsens Salvator substantiâ suâ nobis adest," "in substance, but after a sacramental manner:" which words if they might be understood in the sense in which the Protestants use them, that is really, truly, without fiction or the help of fancy, but "in rei veritate," so, as Philo calls spiritual things ἀναγκαιόταται οὐσίαι, "most necessary, useful, and material substances," it might become an instrument of a united confession.

. . . . . .

One thing more I am to note in order to the same purposes: that, in the explication of this question, it is much insisted upon, that it be inquired whether, when we say we believe Christ's body to be "really" in the sacrament, we mean "that body, that flesh, that was born of the Virgin Mary," that was crucified, dead, and buried? I answer, I know none else that he had, or hath: there is but one body of Christ, natural, and glorified; but he that says that body is glorified which was crucified, says it is the same body, but not after the same manner: and so it is in the sacrament; we eat and drink the body and blood of Christ, that was broken and poured forth; for there is no other body, no other blood of Christ; but though it is the same which we eat and drink, yet it is in another manner; and, therefore, when any of the Protestant divines or any of the fathers deny that body which was born of the Virgin Mary, that which was crucified, to be eaten in the sacrament—as Bertram, as St. Jerome, as St. Clemens Alexandrinus, expressly affirm; the meaning is easy—they intend it is not eaten in a natural sense; and then calling it "corpus spirituale," the word "spiritual" is not a substantial predication, but is an affirmation of the manner, though in disputation it be made the

(1) Jeremy Taylor's Works, Heber's edition, vol. iii. p. 291–294.

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predicate of a proposition, and the opposite member of a distinction. "That body which was crucified is not that body that is eaten in the sacrament,"—if the intention of the proposition be to speak of the eating it in the same manner of being; but "that body which was crucified, the same body we do eat,"—if the intention be to speak of the same thing in several manners of being and operating: and this I noted, that we may not be prejudiced by words, when the notion is certain and easy: and thus far is the sense of our doctrine in this article. (1)

And again:—

And certainly he could on no pretence have challenged the appellative of Christian, who had dared either himself to invade the holy rites within the cancels, or had denied the power of celebrating this dreadful mystery to belong only to *sacerdotal ministrations.* For either it is said to be but common bread and wine, and then, if that were true indeed, anybody may minister it, but then they that say so are blasphemous, they count the blood of the Lord τὸ αἷμα τῆς διαθήκης (as St. Paul calls it in imitation of the words of institution), the blood of the Covenant or New Testament, a profane or common thing; they discern not the Lord's body; they know not that the bread which is broken is the communication of the Lord's body. But if it be a holy, separate, or divine and mysterious thing, who can make it (ministerially I mean), and consecrate or sublime it from common or ordinary bread, but a consecrate, separate, and sublimed person?

And further:—

And certainly, there is not a greater degree of power in the world than to remit and retain sins, and to consecrate the sacramental symbols into the mysteriousness of Christ's body and blood; nor a greater honour than that God in heaven should ratify what the priest does on earth, and should admit him to handle *the sacrifice of the world*, and *to present the same which in heaven is presented* by the eternal Jesus. (2)

Dr. Hey, Norisian Professor of Divinity, in his lectures on the Articles, observes:—

Latimer, in the Disputation at Oxford in 1554 (or in the Paper which he gave in), said that he maintained the *real* presence of Christ in the eucharist, but not the *corporal* (*see* Fox, or Collier, A.D. 1554). Archbishop Secker (Lect., vol. ii., p. 251) says the Church has always acknowledged the *real* presence. Yet Wheatly (p. 320), says it (real essential presence of Christ's natural flesh and blood), was not allowed at first; in the time of Edward VI. it seemed to approach so near transubstantiation. Fulke, on Heb. i. 6, denies the reality of Christ's *corporal* presence. Queen Elizabeth seems to have been willing to *comprehend* as many as possible in the New English Church; and with that view to have endeavoured to use a language which all might adopt who did not profess transubstantiation in the strictest sense, and which might, nevertheless, be used by those who did not

(1) Jeremy Taylor's "Life of Christ," p. 427.

(2) "Clerus Domini. The Divine Institution and Necessity of the Office Ministerial," written by the special command of King Charles I. sec. 5. Heber's edition, vol. xiv. p. 452–459.

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admit any presence of Christ in the eucharist perfectly corporal. Such language would comprehend all Lutherans, and some Papists. I think this remark will be sufficient to account for the change of the expressions in the 28th of our present Articles (on which Bishop Burnet speaks judiciously), and for the language in the second Book of Homilies, both as to the word 'incorporation' and the insisting on *faith* and *spiritual* eating of the sacrament. (1)

Bishop Pearson, in his great work on the Creed, observes:—

Vain, therefore, was that old conceit of Eutyches, who thought the union to be made so in the natures, that the humanity was absorbed and wholly turned into the divinity, so that by that transubstantiation the human nature had no longer being. And well did the ancient fathers, who opposed this heresy, make use of the sacramental union between the bread and wine and the body and blood of Christ, and thereby showed that the human nature of Christ is no more really converted into the divinity, and so ceaseth to be the human nature, than the substance of the bread and wine is really converted into the substance of the body and blood, and thereby ceaseth to be both bread and wine; from whence it is by the way observable, that the Church in those days understood no such doctrine as that of transubstantiation. (2)

Saravia was successively prebendary of Gloucester, Canterbury, and Westminster. He was, in 1607, one of the translators of the Bible. He lived on terms of intimate friendship with Hooker, as Izaak Walton relates. He wrote in Latin a treatise on the Holy Eucharist, which has been recently translated. He says:—

In a sacrament, there be three things to be considered which be severally to be distinguished. The outward visible sign, and the invisible and heavenly thing united sacramentally to the sign. The third thing, that which floweth from them, is the benefit of the sacrament. Concerning those two parts Augustine saith, "What we say is this—what we endeavour by every means to prove is this—namely, that the sacrifice of the church is made up of two things, consisteth of two things, the visible form of the elements and the invisible flesh and blood of our Lord Jesus Christ; that is of the 'Sacramentum,' and of the 'Res Sacramenti,' that is, the body of Christ." Now, orthodox divines declare that the virtue of the sacrament is a different thing from the sacrament itself; that is a different thing from those two parts of which the sacrament is made up. Augustine writeth upon the Gospel of St. John. "For now also," he saith, "we receive the spiritual food; but the sacrament is one thing, the virtue of the sacrament is another." The same father in the same place: "If any one shall eat of It, he shall not die: but this pertaineth to the virtue of the sacrament, not to the visible sacrament." Therefore the sacrament is to be considered apart by itself, as it consisteth of the visible form of the elements and the invisible flesh and blood of our Lord Jesus Christ. (3)

(1) Hey's Lectures in Divinity, vol. iv. p. 331.

(2) Bishop Pearson on the Creed, Article III. vol. i. p. 288. (Burton's edition.)

(3) Treatise of the Holy Eucharist, p. 23. London, 1855.

Bishop Andrewes again, in his "Answer to the Apology of Cardinal Bellarmine," which I have already cited, says:—

Now, Ambrose says that the nature is changed; and so indeed it is. For, as the Cardinal knows full well, the nature of the element is one, that of the sacrament is another. Nor do we deny that the nature of the element is changed by the benediction, so that the bread as soon as consecrated is no longer the bread as nature formed it, but as the benediction has consecrated it; and by consecration also changed. (1)

Again, that grave author (who bears the name of Cyprian, yet is not Cyprian), says, that "the bread is changed in nature not in appearance;" which we deny not, but deprecate the Cardinal's gloss upon it, explaining, "the nature, i.e. the substance; and the appearance, i.e. the substance." For, when the almighty power of the Word is added, the nature is changed, so that what was before a bare element now becomes a divine sacrament, retaining, however, its former substance. This is taught by the words which immediately succeed, which are part of the same sentence, although by you they are always, not very honestly, cut out. As in the person of Christ both the humanity was manifest and the divinity concealed; so the divine essence, the visible sacrament, enters. Verily, the conjunction between the visible sacrament and the invisible subject matter of the sacrament is the same as that which exists between the humanity and the divinity of Christ, where, unless you are willing to savour of the doctrine of Eutyches, the humanity is not transubstantiated into the divinity. (2)

Both of them, Gelasius and Theodoret, argue against Eutyches; and from their testimony it is clear that the transmutation which takes place in the sacrament is not a change of substance. I add also Augustine—"This is what we assert and approve of by all means; that the sacrifice of the eucharist consists of two things, the visible appearance of the elements and the invisible flesh and blood of our Lord Jesus Christ of the sacrament and the subject matter of the sacrament, even as the person of Christ is evidently made up of God and man: since Christ is truly God and truly man. For everything contains the nature and truth of these things of which it is made up. But the sacrament of the church is made up of two things, viz. the sacrament and the subject matter of the sacrament, that is, the body of Christ." (3)

Brevint, who died Dean of Lincoln about 1695, published a work called "Christian Sacrament and Sacrifice," in which he says:—

Hence it appears what crime it is not to discern the Lord's body. It is to do worse than Esau did who sold his birthright for a trifle. It is to value at the same rate the anointing of a prophet and the composition of a performer. It is to take the Lord's body for a despicable morsel of bread; in a word, it is to perform the action of a beast that devours but the gross and earthy matter of this sacrament, and to have nothing of a Christian or rational creature who elevates his

(1) Responsio ad Apologiam Cardinalis Bellarmini (Library of Anglo-Catholic Theology), p. 263.

(2) Ibid. p. 265.

(3) Responsio ad Apologiam Cardinalis Bellarmini (Library of Anglo-Catholic Theology), p. 266.

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soul to that body which by Christ's institution it represents, and to the grace of that body which it promises. For since the proper essence of sacred signs or sacraments consists not in what they are in their nature, but in what they signify by divine institution, hence it happens infallibly that when the sacraments are abused, the injury must needs light not upon them in their own natural being, bread, wine, and water, which upon this account are not at all considerable, but upon the holy mysteries, the body and blood of Christ himself who is the main object of their formal being, that is, their signification. And therefore the apostle speaks most exactly when he says that whosoever eats of this bread unworthily, doth not discern or doth not sanctify, but uses as a common and profane thing the very body of Jesus Christ. (1)

Thorndike, Master of Sidney Sussex College, Prebendary of Westminster, one of the Commissioners at the Savoy Conference for revising the Book of Common Prayer, in his "Laws of the Church," says:—

But if I allow them that make it more than such a sign to have departed from a pestilent conceit, and utterly destructive to Christianity, I cannot allow them to speak things consequent to their own position when they will not have these words to signify that the elements are the body and blood of Christ *when they are received, but become so upon being received with living faith;* which will allow no more of the body and blood of Christ to be in the sacrament than out of it. For the act of living faith importeth the eating and drinking of the flesh and blood of Christ, no less without the sacrament than in it. . . . . If "This is my body," "This is my blood," signifieth no more than "This is the sign of my body and blood," then is the sacrament of the eucharist a mere sign of the body and blood of Christ, without any promise of spiritual grace; seeing that being now a sacrament, by being become a sacrament it is become no more than *a sign* of the body and blood of Christ, which, though a living faith spiritually eateth and drinketh when it receives the sacrament, yet it should have done no less without receiving the same. (2)

As the eating and drinking of Christ's flesh spiritually by faith presupposes the flesh of Christ crucified and his blood poured forth, so must the eating of it in the sacrament presuppose the being of it in the sacrament, to wit, by the being and becoming of it a sacrament; unless a man can spiritually eat and drink the flesh and blood of Christ in and by the sacrament, which is not in the sacrament when he eats and drinks it, but by his eating and drinking of it comes to be there. . .

But if the flesh and blood of Christ be not there by the virtue of the consecration of the elements into the sacrament, then cannot the flesh of Christ and his blood be said to be eaten and drunk in the sacrament, which are not in the sacrament by being a sacrament, but in him that eats and drinks it. For that which he finds to eat and drink in the sacrament cannot be said to be in the sacrament, because it is in him that spiritually eats and drinks it by faith. Either, therefore, the flesh and blood of Christ cannot be eaten and drunk in the eucharist, or

(1) "Christian Sacrament and Sacrifices," s. v. s. 9.

(2) Laws of the Church, Book III. ch. ii. p. 6, 1st edit. 1659.

it is necessarily in the sacrament *when* it is eaten and drunk in it; in which if it were not, it could not be eaten and drunk in it. (1)

If these things be true, it will be requisite that we acknowledge a change to be wrought in the elements by the consecration of them into the sacrament. For how should they come to be *that which they were not* before, to wit, *the body and blood of Christ*, without any change? And in regard of this change the elements are no more called by the name of their nature and kind after the consecration, but by the name of that *which they are become*. Not as if the substance thereof were abolished, but *because it remains no more considerable to Christians;* who do not, nor are to look upon, this sacrament with any account of what it may be to the nourishment of their bodies by the nature of the elements, but what it may be to the nourishment of their souls by the spirit of God assisting in and with his flesh mystically present in it. But this change, *consisting in the assistance of the Holy Ghost which makes the elements in which it dwells the body and blood of Christ*, it is not necessary that we acknowledge the bodily substance of them to be any way abolished. (2)

And again:—

"It is not here to be denied that all ecclesiastical writers do with one mouth bear witness to the presence of the body and blood of Christ in the eucharist, neither will any of them be found to ascribe it to *anything but the consecration*, or that to any faith but that upon which the Church professeth to proceed to the celebrating of it. And upon this account when they speak of the elements supposing the consecration to have passed upon them, they always call them by the name, not of their bodily substance, but of the body and blood of Christ which they are become. (3)

And again:—

And upon these premises I conclude, that as it is by no means to be denied that the elements are really changed, translated, turned and converted, into the body and blood of Christ (so that whoso receiveth them with a living faith is spiritually nourished by the same, he that with a dead faith is guilty of crucifying Christ), yet is not this change destructive to the bodily substance of the elements, but cumulative of them with the spiritual grace of Christ's body and blood, so that the body and blood of Christ in the sacrament turns to the nourishment of the body, whether the body and blood in the truth turn to the nourishment or the damnation of the soul. (4)

From Bramhall, who died Archbishop of Armagh in 1663, a prelate of considerable erudition, I cite these passages:—

Having viewed all your strength with a single eye, I find not one of your arguments that comes home to transubstantiation, but only to a true real presence,

(1) Laws of the Church, Book III. ch. ii. p. 8.

(2) Laws of the Church, Book III. ch. iii. p. 16.

(3) Laws of the Church, Book III. ch. iv. p. 30.

(4) Laws of the Church, Book III. ch. iv. pp. 33, 34.

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which no genuine son of the Church of England did ever deny, no, nor your adversary himself. Christ said, "This is my body;" what He said we do stedfastly believe. He said not, after this or that manner *neque con, neque sub, neque trans.* And therefore we place it among the opinions of the schools, not among the articles of our faith. The holy eucharist, which is the sacrament of peace and unity, ought not to be made matter of strife and contention. (1)

And again:—

Abate us transubstantiation, and those things which are consequent of their determination of the manner of presence, and we have no difference with them in this particular. They who are ordained priests ought to have power to consecrate the sacrament of the body and blood of Christ, that is, to make them present. (2)

Sparrow, Bishop of Exeter and of Norwich, died in 1685. He was also one of the commissioners for revising the prayer-book. In his "rationale" of that book he has these words:—

Next is the consecration. So you shall find in Chrysostom and Cyril last cited. Which consecration consists chiefly in rehearsing the words of our Saviour's institution, this is my body, and this is my blood, when the bread and wine is present upon the communion table. "The holy sacrament of the Lord's Supper," says S. Chrysostom, "which the priest now makes, is the same that Christ gave to his apostles, &c." Again, "Christ is present at the sacrament now, that first instituted it. He consecrates this also: it is not man that makes the body and blood of Christ by consecrating the holy elements, but Christ that was crucified for us. The words are pronounced by the mouth of the priest, but the elements are consecrated by the power and grace of God." "This is," saith He, "my body;" by this word the bread and wine are consecrated.

When the priest hath said at the delivery of the sacrament, The body of our Lord Jesus Christ which was given for thee, preserve thy body and soul unto everlasting life, the communicant is to answer amen; by this amen, professing his faith of the presence of Christ's body and blood in that sacrament. (3)

Tillotson, who died Archbishop of Canterbury, in 1694, and was of a different school of divinity from the last author, nevertheless says:—

I deny not but that the fathers do, and that with great reason, very much magnify the wonderful mystery and efficacy of the sacrament, and frequently speak of a *great supernatural change made by the divine benediction*, which we also readily acknowledge. (4)

Yardley, Fellow of St. John's College, Cambridge, who died

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(1) Works, fol. ed. p. 15.
(2) Works, fol. ed. p. 485.
(3) Rationale upon the Book of Common Prayer, pp. 211, 216, 220. (Oxford Edition, 1840.)
(4) Discourse on Transubstantiation.

Archdeacon of Cardigan, in 1770, an authority cited by Bishop Mant, says:—

After the consecration of the elements immediately follow the reception and distribution of them, which continue still in their natural substance of bread and wine, though they are changed in their value and efficacy into the sacramental body and blood of Christ. (1)

Beveridge, who died Bishop of St. Asaph, in 1708, and wrote a well-known "Exposition of the Thirty-nine Articles," says:—

Hence also it is, that our Church requires us to receive the holy sacrament kneeling, not out of any respect to the creatures of bread and wine, but to put us in mind that Almighty God, our Creator and Redeemer, the only object of all religious worship, is there specially present, offering his own body and blood to us, that so we may act our faith in him, and express our sense of his goodness to us, and our unworthiness of it, in the most humble posture that we can. And, indeed, could the Church be sure that all her members would receive as they ought with faith, she need not to command them to receive it kneeling, for they could not do it any other way. For how can I pray in faith to Almighty God, to preserve both my body and soul to everlasting life, and not make my body as well as soul bow down before him? How can I by faith behold my Saviour coming to me, and offering me his own body and blood, and not fall down and worship him? How can I by faith lay hold upon the pardon of my sins, as there sealed and delivered to me, and receive it any otherwise than on my knees? I dare not, I cannot do it; and they who can, have too much cause to suspect that they do not discern the Lord's body, and therefore cannot receive it worthily. Be sure, our receiving the blessed body and blood of Christ, as the Catholic Church always did, in an humble and *adoring* posture, is both an argument and excitement of our faith in him. By it we demonstrate that we discern the Lord's body, and believe him to be present with us in a particular sacramental sense, and by it we excite and stir up both ourselves and others to act our faith more stedfastly upon him, in that by our *adoring* him, we actually acknowledge him to be God as well as man; and therefore on whom we have all the reason in the world to believe and trust for our salvation. (2)

I cannot more fitly conclude this catalogue than by a reference to the high authority of the present Bishop of Salisbury, Dr. Moberly, who, in one of his Bampton Lectures, observes upon the holy eucharist as follows:—

In order to constitute its complete character according to the divine pattern of its institution, it absolutely requires two things. First, there must be the consecration of the elements by the priest, the organ of the priestly church, empowered by sacred ordinance to do that solemn and indispensable portion of the

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(1) Cited in Mant's Book of Common Prayer.

(2) Bishop Beveridge, on "Frequent Communion," p. 208.

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joint act which none else may presume to exercise or intrude upon; for it is no common nor ordinary work which he has to do. It is no light thing that by the acts that he organically does, and the words which he organically utters, *the spiritual presence of the Lord is so brought down upon the elements of bread and wine, as that to the faithful they become verily and indeed, however invisibly and mysteriously, the body and blood of Christ.* (1)

Again:—

There has never been a question of the absolute confinement of the power of consecrating the bread and wine to their mysterious efficacy of becoming to the faithful, and to the church of the faithful, the body and blood of the Lord, to the ordained clergy. (2)

Again:—

No doubt some of the ancients, as, for example, St. Chrysostom, in the treatise on the priesthood, used very strong and remarkable language on this part of the subject. I venture to think that as we should not have scrupled to use similar language if we had lived before the Roman theory of transubstantiation had been elaborated into all its train of evil and superstitious consequences, so would he in all probability have guarded his expressions had he been writing in later days, when that philosophical theory had been invented and made to take the place of the simple doctrine of the real, and as *in our modern mode of speech we call it, the objective presence of the body and blood of Christ in the sacred elements.*

Under the *outward and visible form of bread and wine* we believe that the body and blood of our Lord and Saviour Jesus Christ are given, taken, and received; and we believe that that divine food, according to the sacred teaching of our own liturgy in this respect, imparts to every one of those who receive it with true penitent heart and lively faith, these nine inestimable blessings. (3)

Again:—

That divine nourishment is the body and blood of Christ. It is hardly possible, brethren, in these days of division and disputation on all the most sacred articles of the faith to pass by, quite without notice, the extreme diversity of opinion of churches and doctors on this most sacred, and in its general terms unquestioned, doctrine, but it suits little with my purpose to dwell upon such diversities at any length.

And then this learned prelate adds the following words which deserve the most careful attention, both from the great weight due to the authority which uttered them, and from their bearing upon the present case:—

I will therefore only say that the ancient doctrine of the Church, and, as I read it, the unquestionable doctrine of the Church of England, is that the spiritual pre-

(1) Moberly's Bampton Lectures, pp. 176, 177.

(2) Moberly's Bampton Lectures, p. 177.

(3) Moberly's Bampton Lectures, pp. 173–4.

sence of the body and blood of our Lord in the Holy Communion is objective and real. I do not see how we can consent, as with Hooker and Waterland, to limit authoritatively that presence to the heart of the receiver; for the words of the institution (and these are cases in which we are rigidly and absolutely bound to the exact words of the revelation), the words, I say, of the Lord in the institution, seem to forbid such a gloss. (1)

Real presence. —The use of the terms Objective and Subjective.

During the course of the argument the use of the phrase *objective* presence was demurred to by counsel for the promoter.

It was said, I believe quite truly, that the phrase had been recently introduced into treatises of English theology; a remark which might also be made with respect to the introduction of it into systems of philosophy. I mean to speak with proper diffidence on this subject, but the fact seems to be by no means conclusive against the use of it in either science.

Philosophy and theology have derived these terms, *objective* and *subjective*, from the schoolmen, and in both sciences they express a distinction which, perhaps, no other terms can adequately convey.

Subjective, in both sciences, denotes, I believe, that which belongs to the mind or soul of man, the thinking conscious subject.

Objective denotes that which belongs to what is without or external to the mind or soul of man, the object known, perceived, or believed to exist. It signifies what is real in opposition to what is ideal; what exists in nature in contrast to what exists in thought; what has a substantive, independent existence in fact, not a relative dependent existence in the mind or soul of the individual. (2)

Thus the phrase *subjective* presence would be used, I presume, to mean that the presence of Christ is in the act of reception by the communicant of the consecrated elements themselves.

The phrase *objective* presence would be used, I presume, to mean that the presence of Christ is mysteriously, but really, in the consecrated elements apart from the act of reception by the communicant.

The use of these phrases cannot be imposed as a necessary condition of resolving the question as to the mode of the presence.

(1) Moberly's Bampton Lectures, p. 171.

(2) Sir W. Hamilton's Lectures, vol. ii. pp. 159, 160.

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It seems to me that the language of the present Bishop of Carlisle on this point deserves attention.

> We see it and hear it, for instance, continually and very warmly discussed, whether the presence of Christ in the sacrament be an *objective* or a *subjective* presence. It is taken for granted that it must be either the one or the other; it must either be *objective*, that is, independent of the mind contemplating it, or else it must be *subjective*, that is, dependent upon the contemplating mind. Now it may seem at first sight that this view of the question is exhaustive; and yet whichever horn of the dilemma you take you arrive at consequences not easily admissible. Is it conceivable that the presence of Christ should be altogether independent of the worshipper? If so, do you not degrade that presence, and run the risk of confounding the sacrament with a charm, something that can produce results without the accompanying energy of a true and living faith on the part of those who receive it? On the other hand, is it conceivable that the presence of Christ should be altogether dependent upon the spirit of the worshipper, so that there should be no absolute and independent truth and meaning in the words of our Lord when he said, "This is my body," and "This is my blood?" I cannot accept either horn of the dilemma. And if it be asked, What then will you do? I reply by denying that any one has a right to submit the words of Christ to any dilemma of the kind. What right have we to say that his presence must be either *objective* or *subjective?* Why may it not in some sense be both? Or how do we know that that mysterious presence of which we speak is capable of being described under such a formula at all. (1)

However recently the terms *objective* and *subjective* may have been introduced into our theology, and whether the introduction of them has or has not been necessitated or justified by increased laxity and confusion of speech upon the subject of the holy eucharist, they are certainly now supported by very high authority, even if we confine our consideration to the writers of our own country. They have been adopted, as will be seen in the citations which I have made, by some of the most erudite and esteemed of our own divines. And in my opinion it was legally competent to Mr. Bennett to make use of them.

Real presence. —Use of the phrase "Under the form of Bread and Wine."

Great objection was taken by the counsel for the promoter to the phrase "under the form of bread and wine," which it was contended introduced teaching at variance with the formularies of our Church. This form of expression has been used in our formularies as applicable to the substances of bread and wine remaining unchanged. They were so used in the Articles of 1536, and in the "Institution of a Christian Man" in 1537. In

(1) Dean Goodwin's Sermons, 1868, p. 112.

the Six Articles a direct statement of transubstantiation took their place. They do not appear in the "Necessary Erudition" of 1543. After a lapse of four years they reappear under the auspices of Cranmer and other bishops at the end of the first book of the Homilies, where it is said, "Hereafter shall follow sermons of the Nativity, Passion, Resurrection, and Ascention of our Saviour Christ, of the due receiving of his blessed body and blood under the form of bread and wine." And it is not unimportant to observe, that, early in the reign of Elizabeth, the bishops advert to this statement, for in their title to the second book of the Homilies they speak "of such matters as were promised *and entituled* in the former book of Homiles." And in Queen Elizabeth's Primer of 1559 we find the prayer which begins "Our Saviour and Redeemer, Jesu Christ, which in thy last supper with thine apostles didst deliver thy blessed body and blood under the form of bread and wine." The first book of Homilies has undergone two revisions, and the statement "under the form of bread and wine" remains unchanged up to the present time.

Ratramn, it will be seen, adopted pretty much the same form of expression:—

"At quia confitentur et corpus et sanguinem Christi esse, nec hoc esse potuisse, nisi facta in melius commutatione; neque ista commutatio corporaliter, sed spiritualiter facta sit necesse est, ut jam figuratè facta esse dicatur quoniam sub *velamento corporei panis corporeique vini spirituale corpus Christi spiritualisque sanguis existit.* (1)

It is remarkable that the followers of Wickliffe and the Lollards, who were burnt in the reigns of Henry IV. and Henry V., under the authority of the inhuman statute then enacted, appear to have

(1) Ratramni de Corp. et Sanguine Domini, p. 15.

The following is Bishop Burnet's account of Ratramn:—"Ratramnus was commanded by Charles the Bald, then emperor, to write upon that subject, which he, in the beginning of his book, promises to do, not trusting to his own sense, but following the steps of the holy fathers. He tells us that there were different opinions about it; some believing that the body of Christ was there without a figure; others saying that it was there in a figure or mystery; upon which he apprehended that a great schism must follow. His book is very short, and very plain; he asserts our doctrine as expressly as we ourselves can do, he delivers it in the same words, and proves it by many of the same arguments and authorities that we bring." (Burnet, Exposition of the 39 Articles, Art. XXVIII. p. 337).

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maintained "the sacrament of Christ's flesh and his blood in *form of bread and wine*," and to have been burnt for refusing to acknowledge the corporal presence, and to declare that after the words of consecration the material bread and wine no longer existed. (1)

To Sir John Oldcastle (Lord Cobham) in 1414, the inquisitors put the Roman proposition as to the presence, and their question on it as follows:—

> The fayth and the determination of holy churche touchyng the blissful sacrament of the auter, is this; that after the sacramentall wordes ben sayde by a prest in hys masse, the material bred, that was bifore, is turned into Christis verray body; and the material wyn, that was before, is turned into Chrystes verry blode, and so ther leweth in the auter no material brede, no material wyn, the wych wer ther before the seying of the sacramental words; howe fele ye this article? (2)

To which Oldcastle answered, "in sacramento altaris est verum corpus et verus panis, viz., quem videmus, et corpus Christi *sub eodem velatum* quod non videmus." He was burnt for not believing in transubstantiation.

The first of the Six Articles, framed by Henry VIII. when he went back to transubstantiation, is in these words:—"That in the eucharist is really present the *natural* body of Christ *under the forms* and *without the substance* of bread and wine;" which seems to show clearly that the phrase "under the forms of bread and wine" does not *per se* express the doctrine of transubstantiation.

Ridley would certainly have adopted the language of Ratramn, and have induced Cranmer to do so. Cranmer, moreover, approved of the Augsburg Confession, in which the Article is as follows:—

> VII. De Eucharistiâ.
>
> De Eucharistiâ constanter credimus et docemus, quod in sacramento corporis et sanguinis Domini, vere, substantialiter, et realiter adsint corpus et sanguis Christi *sub speciebus panis et vini*. Et quod sub eisdem speciebus verè et realiter exhibentur et distribuuntur illis qui sacramentum accipiunt, *sive bonis sive malis*. (3)

I may observe in passing, that when the Jerusalem Bishopric Act was passed, the instructions from Lambeth and London to the

(1) Southey, History of the Church, ch. xi.; Hume, vol. iii. c. 19.

(2) Wilkin's Concilia Mag. Brit. vol. iii. pp. 355; Collier, Eccl. Hist. vol. iii. p. 294.

(3) Hardwick on the Articles, p. 255.

English bishop were to ordain Prussian subjects who had subscribed the Confession of Augsburg as well as the Thirty-nine Articles of the English Church. The directions were as follows:—

Congregations consisting of Protestants of the German tongue, residing within the limits of the bishop's jurisdiction, and willing to submit to it, will be under the care of German clergymen ordained by him for that purpose, who will officiate in the German language, according to the forms of their national liturgy compiled from the ancient liturgies, agreeing in all points of doctrine with the liturgy of the English Church, and sanctioned by the bishop with consent of the metropolitan for the special use of those congregations; such liturgy to be used in the German language only. Germans intended for the charge of such congregations are to be ordained according to the ritual of the English Church, and to sign the articles of that Church; and, in order that they may not be disqualified by the laws of Germany from officiating to German congregations, they are, before ordination, to exhibit to the bishop a certificate of their having subscribed, before some competent authority, the Confession of Augsburg. (1)

By the joint operation of 3 & 4 Vict. c. 33, and 5 Vict. c. 6, s. 4, persons so ordained may officiate with the consent of the ordinary in England.

It may be well to compare this doctrine, that the body and blood of Christ are spiritually present under the form of bread and wine, with the doctrine of transubstantiation as laid down by the Council of Trent. The difference between the two doctrines is at once apparent.

C. IV. De Transubstantiatione.

Quoniam autem Christus redemptor noster corpus suum id, quod sub specie panis offerebat, vere esse dixit, ideo persuasum semper in ecclesia Dei fuit, idque nunc denuo sancta hæc synodus declarat, per consecrationem panis et vini conversionem fieri totius substantiæ panis in substantiam corporis Christi Domini nostri, et totius substantiæ vini in substantiam sanguinis ejus. Quæ conversio convenienter et proprie a sancta catholica ecclesia *transubstantiatio* est appellata.

Can. II. Si quis dixerit, in sacrosancto eucharistiæ sacramento *remanere substantiam* panis et vini una cum corpore et sanguine Domini nostri Jesu Christi, negaveritque mirabilem illam et *singularem conversionem totius substantiæ panis* in corpus, et *totius substantiæ vini* in sanguinem, *manentibus duntaxat speciebus* panis et vini, quam quidem conversionem catholica ecclesia aptissime transubstantiationem appellat, anathema sit. (2)

Nicholson, Bishop of Gloucester, one of the committee selected by the Convocation in 1661 to undertake, in compliance with the

(1) From a "Statement of Proceedings relating to the Establishment of a Bishopric of the United Church of England and Ireland in Jerusalem. Published by authority." Pamphlet: London, December, 9th, 1841.

(2) Canones, &c., Concilii Tridentini, p. 60.

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King's order, the revision of the prayer-book, speaking of the holy eucharist, says, "Christ is there under the forms of bread and wine; not changed in substance but in use" (1); and in that well-known book of devotion, "Sherlock's Practical Christian," we read:—

> Grant, holy Jesus, that as I have now received in faith thy precious body and blood, *veiled under the species of bread and wine*, I may hereafter behold thy blessed face reveiled in heaven. (2)
>
> He discerns not this body of our Lord who sees not with the eye of faith Christ really present *under the species of bread and wine*, though he conceive not the manner thereof . . . . not curiously questioning, much less pragmatically defining, the way and manner of his presence, as being deeply mysterious and inconceivable. These old verses, expressing the faith of the wisest of our first reformers, may satisfy every modest, humble, soberminded, good Christian in this great mystery of godliness:—
>
> It was the Lord that spake it,
> He took the bread and brake it,
> And what his word did make it,
> So I believe and take it.
>
> . . . . . .
>
> And he that receives Christ's holy body and blood into his soul, not first emptied of all his sins by holy faith, and all the sacred offices of true repentance, doth with Judas betray his master into the hand of his enemies, even those very enemies which crucified him; for those were our sins. And therefore it is said of such unworthy receivers that they are guilty of the body and blood of Christ. (3)
>
> Consider (says Sutton) the divine wisdom of the Son of God, who, respecting our weakness, hath conveyed unto us his body and blood after a divine and spiritual manner, *under the form of bread and wine*. (4)

Real presence.—Effect of the 29th Article on this doctrine.

An argument was addressed to me, founded on the 29th Article of Religion, which I must notice. The 29th Article is as follows:—

> XXIX. Of the wicked which eat not the body of Christ in the use of the Lord's Supper.
>
> The wicked, and such as be void of a lively faith, although they do carnally and visibly press with their teeth, as St. Augustine saith, the sacrament of the body and blood of Christ, yet in nowise are they partakers of Christ, but rather to their condemnation do eat and drink the sign or sacrament of so great a thing.

It was not and could not be contended that Mr. Bennett had directly contravened this article, because the charge against him, founded upon it, had been struck out by the Court; but it was

(1) Exposition of Catechism, 178, cited in Keble on Euch. Adoration, p. 142.

(2) Sherlock's Practical Christian, Part II. ch. x. p. 252, ed. 1841.

(3) Sherlock's Practical Christian, Part II. ch. i.

(4) Godly Meditations on the Most Holy Sacrament of the Lord's Supper, p. 26.

argued quite fairly, that this 29th Article furnished a reason why the objective presence could not be the doctrine of the Church of England, otherwise it was said the wicked would be partakers of Christ in the eucharist, which this article declares they are not.

It seems to me, however, that it can be reasonably and fairly argued that the object of the article, which must be construed as a whole, and not, as has been strangely supposed, by the title alone, was to assert that the wicked who received the holy elements received them to their condemnation; that is, that they did not become *spiritually* partakers of Christ, though they *sacramentally* received his body and blood. And the phrase, "eat Christ's body," I may observe, in the title, is a phrase of theology capable of various interpretations. It is taken from the sixth chapter of St. John, and may be, as it has been by high authority (1), interpreted to mean so to eat the body of Christ as to dwell in Christ, or, in other words, to be "partakers of Christ;" they do not eat Christ's body to any purpose or effect for which it was offered to them; they eat it to their damnation; they eat a judgment to themselves, but still in one sense they eat it, or rather, as it is expressed in the old hymn:—

Sumunt boni sumunt mali,
Sorte tamen inæquali,
Vitæ vel interitûs;
Mors est malis vita bonis;
Vide, paris sumptionis
Quam dispar sit exitus!

Bishop Ridley, in the course of his disputation at Oxford, said:—

Evil men do eat the very true and natural body of Christ *sacramentally*, and no further, as St. Augustine saith; but good men do eat the very true body both *sacramentally* and *spiritually*, by grace. (2)

And again we have this passage:—

Watson.—"Good sir, I have determined to have respect to the time, and to abstain from all those which may hinder the entrance of our disceptation: and therefore first I ask this question: When Christ said, in John vi., 'He that eateth my flesh,' &c., doth he signify in those words the eating of his true and natural flesh, or else of the bread and symbol?"

Ridley.—"I understand that place of the very flesh of Christ to be eaten, but spiritually. And further I say, that the sacrament also pertaineth unto the

(1) Pusey on the Real Presence, p. 255. (2) Works, p 246

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spiritual manducation: *for without the spirit to eat the sacrament is to eat it unprofitably; for whoso eateth not spiritually, he eateth his own condemnation.*" (1)

St. Augustine, upon whose authority the 29th Article professes to be founded, frequently states that the wicked do, in the sense which I have mentioned, receive the body of Christ. He says:—

Sicut enim Judas, cui buccellam tradidit Dominus non malum accipiendo, sed malè accipiendo locum in se diabolo præbuit, sic indignè quisque sumens Dominicum sacramentum non efficit, ut quia ipse malus est, malum sit, aut quia non ad salutem acceperit, nihil acceperit. *Corpus enim Domini et sanguis Domini nihilominus erat illis quibus dicebat apostolus:* Qui manducat indignè judicium, sibi manducat et bibit. (2)

De uno pane et Petrus et Judas accepit; Petrus ad vitam, Judas ad mortem; *cibus bonus bonos vivificat malos mortificat.* (3)

Corpus Christi cum signo diaboli accipere non timent. (4)

Judas Christi corpus accepit. (5)

Other instances might be mentioned.

Dr. Jackson, to whom I have already adverted, adds the weight of his great authority to this construction of the article:—

The questions then to be discussed are two:—

First, what it is to eat Christ's flesh and drink his blood?

Secondly, what it is for Christ to dwell or abide in us, and us to dwell or abide in him?

All agree that there is a twofold eating of Christ's body and a twofold drinking of his blood; one merely sacramental, and another spiritual; which agreement notwithstanding, there ariseth a third question, viz., what manner of eating Christ's flesh and drinking his blood is in this place either only or principally meant?

For the resolution of this question, we are briefly to explicate each member of this division; viz. (1), what it is to eat Christ's body and drink his blood sacramentally only; (2), what it is to eat his body and drink his blood spiritually.

First, then, all that are partakers of this sacrament *eat Christ's body and drink His blood sacramentally;* that is, they eat that bread which *sacramentally* is his body, and drink that cup which *sacramentally* is his blood, whether they eat or drink *faithfully* or *unfaithfully.* For all the Israelites (1 Cor. x.) drank of the same spiritual rock, which was Christ sacramentally; all of them were partakers of his presence, when Moses smote the rock; *yet with many of them God was not well pleased,* because they did not faithfully either drink or participate of his presence. And more displeased he is with such as eat Christ's body and drink his blood unworthily, though they eat and drink them sacramentally; for eating and drinking so only, that is, without faith or due respect, they eat and drink to their

(1) Works, p. 238.
(2) De Bapt. c. Don. lib. 5.
(3) In Joh. Tr. 50.
(4) Ep. ad Poss.
(5) In Joh. Tr. 62.

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own condemnation, because they do not discern or rightly esteem Christ's body or presence in the holy sacrament.

May we say, then, that Christ is really present in the sacrament, as well to the unworthy as to the faithful receivers? Yes, this we must grant; yet must we add withal, that He is really present with them in a quite contrary manner; really present He is, because virtually present to both; because the operation or efficacy of his body and blood is not metaphorical, but real in both. Thus the bodily sun, though locally distant for its substance, is really present by its heat and light, as well to sore eyes as to clear sights, but really present to both by a contrary real operation; and by the like contrary operation it is really present to clay and to wax; it really hardeneth the one and really softeneth the other. So doth Christ's body and blood by its invisible but real influence mollify the hearts of such as come to the sacrament with due preparation, but harden such as unworthily receive the consecrated elements. If he that will hear the word must take heed how he hears, much more must he which means to receive the sacrament of Christ's body and blood be careful how he receives. He that will present himself at this great marriage feast of the Lamb without a wedding garment, had better be absent. It was always safer not to approach the presence of God, manifested or exhibited in extraordinary manner (as in His sanctuary or in the ark), than to make appearance before it in an unhallowed manner, or without due preparation. Now, when we say that Christ is really present in the sacrament, our meaning is, that as God He is present in an extraordinary manner; after such a manner as He was present (before His incarnation) in His sanctuary, the ark of His covenant; and by the power of His godhead, thus extraordinarily present, He diffuseth the virtue or operation of His human nature either to the vivification or hardening of their hearts who receive the sacramental pledges. So, then, a man, *by eating Christ's body merely sacramentally*, may be excluded from his gracious presence. But no man hath *Christ dwelling in him* by this manner of eating His flesh and drinking His blood unless withal he eat the one and drink the other spiritually. *The eating then, of Christ's body, and drinking His blood, merely sacramentally, is not the eating and drinking here meant.*" (1)

Archbishop Secker expresses himself in pretty much the same sense:—

"It is not," he says, "the gross and literal, but the figurative and spiritual eating and drinking, the partaking by a lively faith of an union with me, and being inwardly nourished by the fruits of my offering up my flesh and blood for you, that alone can be of benefit to the soul."

And as this is plainly the sense in which he says that, "*His flesh is meat indeed, and His blood is drink indeed*," so it is the sense in which the latter part of the third answer of our catechism is to be understood, that, "*The body and blood of Christ are verily and indeed taken and received by the faithful in the Lord's Supper;*" words intended to show that our Church as truly believes the strong assurances of Scripture concerning this sacrament as the Church of Rome doth; only takes more care to understand them in the right meaning, which is that though in one sense *all communicants equally partake of what Christ calls*

(1) Jackson's Works, vol. x. pp. 51–3. (Oxford Edition, 1844.)

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His body and blood, that is, the outward signs of them, yet, in a much more important sense, *the faithful* only, the pious and virtuous receiver, eats His flesh and drinks His blood; shares in the life and strength derived to men from His incarnation and death; and through faith in Him becomes, by a vital union, one with Him—"*a member*," as St. Paul expresses it, "*of His flesh and His bones*,"—certainly not in a literal sense, which yet the Romanists might as well assert, as that we eat His flesh in a literal sense, but in a figurative and spiritual one. In appearance, the sacrament of Christ's death is given to all alike, but *verily and indeed* in its beneficial effects to none but the faithful. *Even to the unworthy communicant He is present, as He is whenever we meet together in His name; but in a better and most gracious sense to the worthy soul, becoming by the inward virtue of His spirit its food and sustenance.* This real presence of Christ in the sacrament His church hath always believed. (1)

South did not scruple to speak of his horror when he considered,—

The pure and blessed body of our Saviour passing through the open sepulchre of such throats,"—(i.e., of the wicked). (2)

Bishop Cosin says:—

A while before the writing of this apology, came forth the diallactic of the famous Dr. Poinet, bishop of Winchester, concerning the truth, nature, and substance of the body and blood of Christ in the blessed sacrament, writ on purpose to explain and manifest the faith and doctrine of the Church of England in that point. (3)

Bishop Poynet, who is thus referred to, says:—

Now as to the denial that the wicked can eat the body of Christ, which would necessarily be the case if virtue and spiritual grace were united with the bread, we must make a distinction. For, if we regard the nature of the sacrament, divine virtue cannot be absent from the sign, in so far as it is a sacrament, and serves for this use; if we look to the morals and mind of the recipient, it is not to him life and grace, both of which it is by its own nature, because the evil of the wicked is not capable of so great goodness, nor suffers it to bear fruit in itself. Nay, rather, it is death and condemnation to them. For, as many kinds of meats are in their own nature wholesome, but, if they enter into diseased bodies increase the evil, and often accelerate death, not by their own nature but by the fault of the receiver, so it is with regard to the sacrament, in which its own virtue is always present, until it discharges its office; although, when taken by the unworthy, he is not capable of receiving such goodness, or of deriving any profit therefrom. Cyprian confirms this: "Sacraments," he says, "cannot exist without their own virtue, nor can the divine majesty be ever absent from the mysteries." But although the sacraments are permitted to be taken or touched by the unworthy,

(1) Secker, Lecture XXXVI. vol. xiv. p. 493. (Edinburgh Edition, 1792.)

(2) South's Sermons, vol. ii. p. 310.

(3) History of Transubstantiation, vol. iv. p. 159.

they whose want of faith or unworthiness resists so great holiness cannot be partakers of the spirit. Therefore to some these gifts are the savour of life unto life, to others the savour of death unto death, because it is altogether just that those who despise the grace should be deprived of so great benefit, and that purity should not make an abode for itself in those who are unworthy of such grace.

Then this author quotes St. Augustine as maintaining these views. He also says:—

From these and many places it is evident that the eucharist, as far as appertains to the nature of the sacrament, is truly the body and blood of Christ, is a truly divine and holy thing, even when it is taken by the unworthy, while, however, they are not partakers of its grace and holiness, but drink their own death and condemnation. Nor in them does such goodness dwell, nor does it enter in order to dwell, but to condemn; nor does the contact of the Lord's body more profit them than it did the Jews to have touched that holy body of his, always endowed with its own grace. Wherefore the sacraments continue, so long as they are sacraments, to retain their own virtue, nor can they be separated therefrom. For they always consist of their own parts—an earthly and a heavenly, a visible and an invisible, an inward and an outward, whether the good take them or the bad, whether the worthy or the unworthy. Besides, that commutation of th signs, and the transition of the elements into the inward substance, which everywhere occurs in the ancient writers, cannot exist, if we separate the virtue from the sign, and we wish the one to be taken apart from the other. But this is to be understood, so long as the sign serves its use, and is adapted to the end for which it was destined by the word of God. . . . . The dignity of the sacraments, and the honour due to them, is not injured, but remains whole and entire, so long as we confess that the truth of the body and its nature and substance is received by the faithful, together with the symbols, as the ancient Fathers testify. . . . .

The good and the bad alike eat sacramentally with their mouths the body of Christ and drink His blood, but the good alone do this spiritually. Now to eat the body of Christ sacramentally, and to drink his blood, is to receive the sacrament of his body and blood; that is, the bread and the body of Christ, the wine and the blood of Christ. For in no other way are the bread and the wine sacraments. And he who thinks it possible that the outward signs can be partaken of apart from those things signified, which are a necessary part of the sacrament, divideth, or rather dissolveth, the sacrament. For the outward symbols be only one part of the sacrament. (1)

He who receiveth only the bread receiveth no sacrament; for either the sacrament is received whole and perfect or not at all. Augustine—"Sacraments, however, if they be the same, are everywhere whole and perfect, although their meaning be depraved, and the handling of them be various and discordant." For it is not more contrary to reason that the flesh of Christ be eaten sacramentally, and His blood drunken by hypocrites, than that it should have been possible that God should have been touched and kissed by the wicked, whensoever they either

(1) Diallacticon viri boni et literati, de veritate, naturâ, atque substantiâ Corporis et Sanguinis Christi in Eucharistiâ.

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kissed or touched Christ, without any profit, to their own damnation." (Augustine on Baptism against the Donatists). *Nor doth it make any difference, when the question is touching the perfectness and holiness of the sacrament what be the belief and what the faith of the man who receiveth the sacrament. It maketh, indeed, all the difference in respect of the way of salvation, but in respect of the question, what a sacrament is, it maketh no difference at all. For it may happen that a man may have the sacrament in its completeness, and a perverted faith, just as it may happen that a man may have all the words of the Creed, and yet have no right belief.* (1)

Thorndike says:—

But if eating and drinking the body and blood of Christ in this sacrament unworthily be the crucifying of Christ again, rendering a man "guilty" of His body and blood, then is not His flesh and blood *spiritually* eaten and drunk till living faith make them *spiritually* present to the soul, which the consecration maketh sacramentally present to the body. And it is to be noted that no man can say that this sacrament *represents* or *tenders and exhibits* unto him that receiveth the body and blood of Christ (as all must do that abhor the irreverence to so great an ordinance which the opinion that it is but a bare sign of Christ crucified necessarily engendereth), but he must believe this: unless a man will say that which is not present may be represented, that is to say, tendered and exhibited presently down upon the place. It is not, therefore, that living faith which he that receives the eucharist, and is present at the consecrating of it, may have and may not have that causeth the body and blood of Christ to be *sacramentally present* in the elements of it, but it is the profession of that common Christianity which makes men members of God's church; in the unity whereof wheresoever this sacrament is celebrated (without inquiring whether those that are assembled be of the number of those to whom the kingdom of heaven belongs), *thou hast a legal presumption even towards God that thou receivest the flesh and blood of Christ in and with the elements of bread and wine, and shalt receive the same spiritually for the food of thy soul, supposing that thou receivest the same with living faith.* For one part of our common Christianity being this, that our Lord Christ instituted this sacrament with a promise to make by His Spirit the elements of bread and wine *sacramentally* his body and blood, so that his Spirit that made them so (*dwelling in them* as in his natural body) should feed them with Christ's body and blood that receive the sacrament of them with living faith; this institution being executed, that is, the eucharist being consecrated according to it, so sure as Christianity is true, so sure the effect follows. (2)

Thorndike is very explicit in distinguishing between the merely *sacramental* reception by the wicked and the *spiritual* reception by the good.

Here, indeed, it will be requisite to take notice of that which may be objected for an inconvenience that God should grant the operation of his Spirit to make

(1) Diallacticon viri boni et literati, de veritate, naturâ, atque substantiâ Corporis et Sanguinis Christi in Eucharistiâ.

(2) Laws of the Church, ch. iii. pp. 17, 18.

the elements sacramentally the *body and blood of Christ* upon the dead faith of them who *receive it* to their condemnation in the sacrament, and therefore cannot be said to *eat* the body and blood of Christ (which is only the act of living faith) without that abatement which the premises have established, to wit, in the sacrament. But all this, if the effect of my saying be thoroughly considered, will appear to be no inconvenience. For that the *body and blood of Christ should* be *sacramentally* present in and under the elements (to be *spiritually* received of all that meet it with a living faith, to condemn those for crucifying Christ again *that receive it with a dead faith*), can it seem any way inconsequent to the consecration thereof by virtue of the common faith of Christians, professing that which is requisite to make true Christians, whether by a living or a dead faith; rather must we be to seek for a reason why "he that eateth this bread and drinketh this cup unworthily" should be "guilty of the body and blood of Christ" as "not discerning it;" unless we suppose the same sacramentally present by virtue of that true Christianity which the Church, professing and celebrating the sacrament tendereth it for a spiritual nourishment to a living faith,—for matter of damnation to a dead faith. For if the profession of true Christianity be, as of necessity it must be, matter of condemnation to him that professeth it not truly (that is to say, who professing it doth not perform it), shall not his assisting the celebration and consecration of the eucharist produce the effect of rendering him condemned by himself (*eating the body and blood of Christ* in the sacrament out of a profession of Christianity which spiritually he despiseth), for not fulfilling what he professeth; or that living faith which concurreth to the same as a good Christian should do, be left destitute of that grace which the tender of the sacrament promiseth because the faith of those who join in the same action is undiscernible? Certainly if the sacramental presence of Christ's body and blood, tendering the same spiritually, be a blessing or a curse, according to the faith which it meets with, it can by no means seem unreasonable that it should be attributed to that profession of Christianity which makes it respectively a blessing or a curse, according to the faith of them for whom it is intended. (1)

Dr. Hey uses remarkable language as to this 29th Article.

Our *application* (he says) may be confined to *mutual concessions*. And for these I think there is greater room in this article than in any other. The dispute between the Romanists and the Reformed is merely *verbal*—I mean about the present article as separated from all others. They say, the bread after consecration is the body of Christ, even in *substance*. It follows, supposing this true, that *whoever* eats that substance eats the body of Christ; that is, it is not *desecrated* by one mouth more than by another. We say, that the bread continues bread after consecration, and therefore that every receiver eats bread; but that he who does what the Scripture requires may be said, in the prophetic, strong, figurative language of Scripture, to *eat the body* of Christ, as he eats what is appointed to represent that body, and what the Scripture calls briefly that body itself. The Romanists, therefore, and we, use a phrase, "eating the body of Christ," in two different senses; and we also use this proposition, "*The wicked eat Christ's body*" in two different senses; consequently, to dispute about its truth is idle and

(1) Laws of the Church, ch. iii. p. 18.

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childish. They, too, use it as a corollary from a proposition which we think false, though we own the corollary to be rightly deduced. Now, it must always be trifling to dispute about such a corollary as if it were an independent proposition. We both require *preparation* for the sacrament—indeed Romanists more than we; we both say, that unworthy receivers may draw *punishment* upon themselves; we both quote the passage of *Augustin* which is in our article. In short, we both mean that the consecrated bread is not desecrated by the unworthiness of the receiver, and that worthiness is required in order to obtain benefit. (1)

In truth, the construction placed by all these authorities on the 29th Article brings it into harmony with the words of the 25th Article. "And in such only as worthily receive the same they have a wholesome effect or operation; but they that receive them unworthily, purchase to themselves damnation, as St. Paul saith."

I must also observe that the words "the faithful" or "fideles" have been often interpreted to mean the baptized members of the visible church. The parables of the tares and the wheat growing together, the good and the bad fish in the same net, being cited to support this position. Thorndike, in the passage just cited, speaks "of that common profession of Christianity which makes men members of Christ's Church, in the unity whereof wheresoever this sacrament is celebrated, without inquiring whether those that be assembled be of the number of those to whom the kingdom of heaven belongs, &c."

And Barrow, in those great sermons on "The Doctrine of Universal Redemption asserted and explained," which have been always received by the Church as the soundest and most eloquent exposition of her doctrine, observes:—

But our Lord is the Saviour of those persons, and therefore he is the Saviour of all men. This assumption we essayed to shew in the last argument, and many express testimonies of Scripture before mentioned establish it. The common style of Scripture doth imply it, when in the apostolical writings to all the visibly faithful indifferently the relation to Christ as their Saviour is assigned, an interest in all his saving performances is supposed, the titles of σωζόμενοι and σεσωσμένοι (with others equivalent, of justified, sanctified, regenerated, quickened, &c.) are attributed. And in one text (2) GOD is said to be the Saviour chiefly, τῶν πιστῶν,

(1) Hey's Lectures in Divinity, vol. iv. p. 358.

(2) ὅτι ἠλπίκαμεν ἐπὶ Θεῷ ζῶντι, ὅς ἐστι σωτὴρ πάντων ἀνθρώπων, μάλιστα πιστῶν. 1 Timothy, 4, 10.

of the faithful; which word, in its common acceptation, denotes all visible members of the Christian communion. (1)

In accordance with this teaching Bishop Beveridge interprets our 19th Article:—

Of the Church.

The visible Church of Christ is a congregation of *faithful* men in the which the pure word of God is preached, &c.

The bishop says:—

Though the Church of Christ be one and the same Church both in heaven and earth, yet it there differs much from itself as here. There it is triumphant, here militant; here it is militant, not triumphant. There it consisteth of good only, and not of bad; here of bad as well as good. (2)

Our burial service is constructed on the presumption that all who are not unbaptized, or excommunicated, or have not laid violent hands upon themselves, are to be considered as belonging to the Church of Christ.

Before, however, I leave the question as to whether the manducation by the wicked of the elements, without eating Christ, be or be not an argument for the absence of the presence from the consecrated elements, I must observe that an opinion has been maintained by great divines, such as Cyprian and Bishop Ken, that the presence is miraculously withdrawn from the elements in cases where the wicked or a beast have devoured them.

These are the lines of Bishop Ken:—

How Godhead to our human flesh was join'd,
Transcends the reach of an angelick mind.
How God and man with bread and wine unite,
Is too sublime for bounded human sight;
To boundless Godhead both united are,
God tabernacles here, and temples there.
There undivided God and man exist,
The flesh assum'd is ne'er to be dismist;
'Tis transient here, and when a Judas eats
The sacred bread, Christ's Shechinah retreats.
The day and night each other still expel,
Pure God in souls impure can never dwell. (3)

According to this opinion the real presence in the holy eucharist may be maintained by those who deny the reception of Christ "in any sense" by the wicked.

(1) Barrow's Works, vol. iv. pp. 25,26.
(2) Bishop Beveridge on the Articles.
(3) On the Eucharist, Poetical Works, vol. i. pp. 123–128. London, 1721.

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I am of opinion that the doctrine of the real spiritual or of the objective real presence maintained by the defendant is not by necessary implication at variance with this 29th Article of Religion, and, as I have already said, Mr. Bennett is not charged with directly contravening any doctrine respecting the reception of the eucharist by the wicked.

Real presence. —Judgment at Bath, 1856.

The judgment given at Bath by Archbishop Sumner and his assessors against the Archdeacon of Taunton, in 1856, has been cited as having decided the question of the mode of presence adversely to the statements of Mr. Bennett; but I decline absolutely to admit that this decision has any legal validity, or is in any way binding upon this Court in this case.

I do so for various reasons; perhaps one reason is sufficient. That decision was reversed by the Court of Arches and the Privy Council. The decision was appealed from on almost every possible ground of law, civil and ecclesiastical; that is, the nature of the case being considered upon the merits as well as the law. The appeal was heard, in the first instance, upon the construction of the statute 3 & 4 Vict. c. 86, and this appeal was successful in both courts; and, as it decided that the archbishop had by reason of the lapse of time no jurisdiction to try the case at all, the other questions were not discussed; but, as a reference to the pleadings shew, the decision of the archbishop was as stoutly contested on the merits, or on the law strictly ecclesiastical, as on the statute law.

The inference that, because the appellant was successful in limine upon the first objection which he took, he would not have been successful on his other objections which he had not an opportunity of stating, but on which he confidently relied, would indeed be a novel doctrine of jurisprudence.

It is not necessary that I should dwell further upon the subject, or refer to what has happened since 1856; but I ought to add this observation, which perhaps makes all reference to this case unnecessary, namely, that the proceedings against the Archdeacon of Taunton were grounded on his alleged contravention of the law with respect to the reception of the holy eucharist by the wicked; a question which I have not to decide in these proceedings against Mr. Bennett.

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Real Presence. As to the Receptionist Doctrine.

There is a doctrine as to the mode of the presence which has obtained the name of the receptionist doctrine. It is thus expressed by Hooker: "The real presence of Christ's most blessed body and blood is not therefore to be sought for in the sacrament, but in the worthy receiver of the sacrament." To whatever cause this opinion of Hooker may be due, whether, as has been suggested, to his respect for Calvin, or his sympathy with the sufferings of reformers on the Continent (1), or to the result of his own convictions on the subject, it was certainly not his intention to maintain that no other mode of the presence could be lawfully holden by clerks of our Church. For, with that wisdom which is the fruit both of deep learning and fervent charity, he says:—

As for the dark and hidden manner, they (that is "such as love piety") prefer, as becometh them in such case, simplicity of faith before that knowledge which curiously sifting what it should act on, and disputing too coldly of that which the wit of man cannot search, cooleth for the most part all warmth of zeal, and bringeth soundness of belief many times into great hazard.

And again:—

The fruit of the sacrament is the participation of the body and blood of Christ. There is no sentence of Holy Scripture which so much as seemeth to import that we cannot by the sacrament be made partakers of the body and blood, except they be first contained in the sacrament, or the sacrament be turned into them. "This is my body," and "This is my blood," being words of promise, wherein we all agree that by the sacrament Christ doth really and truly as he performeth his promise, why do we vainly trouble ourselves with so hard questions, whether by consubstantiation, or else by transubstantiation, the sacrament itself be first possessed with Christ or no? A thing which no way can either further or hinder us, howsoever it stand, because our participation of Christ in the sacrament dependeth on the co-operation of his omnipotent power which maketh it his body and blood to us, whether with change or without alteration of the element such as they imagine, we need not greatly to care nor inquire. (2).

When Hooker's Puritan adversary observed that in these words he seemed to make light of the doctrine of transubstantiation, Hooker replied:—

They (the Romanists) ought not to stand in it as in a matter of faith, nor to make it a point necessary to salvation as the heretics doth only touch the communion of Christ in the holy sacrament, and neither the one nor the other way of

(1) Hooker's Works, ed. Keble, vol. i., pref. pp. 71, 81. Keble on the Eucharistic Adoration, p. 124.

(2) Hooker's Works, ed. Keble, vol. ii., book v., c. lxvii. 6.

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preparation thereunto. It sufficed to have believed this, and not by determining the manner how God bringeth it to passe, to have entangled themselves with opinions so strange, so impossible to be proved true. They should have considered in this particular sacrament that which Bellarmine acknowledgeth of sacraments in generall. It is a matter of faith to believe that sacraments are instruments whereby God worketh grace in the souls of men; but the manner how he doth it is not a matter of faith. (1)

I was referred to some portions of a charge prepared by the late Archbishop of Canterbury, but which his much lamented death prevented him, perhaps, from correcting, certainly from finishing and delivering. From them it appeared that he adopted, as many divines have done, the opinion of Hooker. For Archbishop Longley I can never cease to feel the highest esteem and the deepest regard. It would be a libel on his memory to suppose that he held this particular mode of the presence to be the only mode which the Church of England allowed her children to believe. The last time that I saw him in public, in the year 1868, he was presiding over the meeting in the theatre at Oxford, the object of which was to found a college for the maintenance of those Church principles which the late Mr. Keble professed. Mr. Keble's edition of Hooker was published in 1845, and his work on the "Eucharistical Adoration" was published in 1857, in both of which he regretted that upon this point Hooker had suffered himself to be biassed by the opinions of foreign reformers, and expressed the strongest possible opinion in favour of the objective real presence in the holy elements:—

Having cited all these authorities, I will now recur to the very words of the 28th Article.

The body of Christ is given, taken, and eaten, in the supper, only after an heavenly and spiritual manner. And the mean whereby the body of Christ is received and eaten in the supper is faith.

(1) Hooker's Works, ed. Keble, vol. ii., book v., c. lxvii. 6:—"In the same sense the Bishop of Carlisle says: 'I mean that they who object to the dogma of transubstantiation, and who say that the Church of Rome had no right to impose such a dogma, do not by that objection express anything incompatible with the strongest opinions concerning our Lord's spiritual presence. What they do say is, that it is wrong to attempt to define that presence by any human formula. And that, especially with regard to the particular formula in question, experience has shown that it is capable of being interpreted in a most mischievous sense, and that it leads almost necessarily, and has in fact led, to the most terrible superstition.'"—Dean Goodwin's Sermons, 1869, p. 104.

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I believe that the position of those who agree with the opinions of the defendant would take this form of argument, or something like it. They say, What is given?—The body of Christ. Who gives it?—Our Lord the great high priest in heaven, by the hands of his priests, ministering, as the 26th Article says, by his "commission and authority" on earth. What is taken?—What has been before given, the body of Christ. What is eaten?—What has been before *given* and *taken*, the body of Christ.

The manner indeed of the giving, the taking, and the eating is only heavenly and spiritual, but not the less on that account is something given, taken, and eaten external to and apart from the giver, taker, and eater. The whole manner of the presence is indeed supernatural, but not the less true; spiritual, but not the less real; heavenly, but not the less actually there to cleanse the body and wash the soul of the communicant. It has happened that among the recent discoveries of ecclesiastical historical records we have a "contemporanea expositio" from the compiler of this article, which cannot, I think, be gainsaid.

Butler 4 PC 416

It is a letter entitled—

"Edmund Gheast, Bishop of Rochester, to Cecil.

"Greeting in ye Lord,

and it goes on as follows:—

"Right Honourable,—I am verye sorye yt you are so sick. God make yow whole, as it is my desyer and prayer. I wold have seen yow er this, accordinge to my dutye and good will, but when I sent to knowe whether I might see yow, it was often answeered yt yow were not to be spoken with.

"I suppose yow have hard how ye Bisshop of Glocestre (i.e. Cheney) found him sclue greeved with ye placynge of this adverbe *onely* in this article, the bodye of Christ is gyven, taken, and eaten in ye supper after an heavenly and spiritual manner *onely*, by cause it did take away ye presence of Christis bodye in ye sacrament, and prively noted me to take his part therein, and yeasterdaye in myn absence more playnely touched me for the same. Whereas betwene him and me I told him plainely that this word *onely* in ye aforesaid article did not exclude ye presence of Christis body fro the sacrament, but onely ye grossenes and sensiblenes in ye receavinge thereof. Ffor I saied unto him, though he tooke Christis body in his hand, receaved it with his mouthe, and that corporally, naturally, reallye, substantially, and carnally, as ye doctors doo write, yet did he not, for all that, see it, feale it, smelle it, nor taste it. And therefore I told him I wold speake against him herein, and *ye rather by cause ye article was of myn own pennynge*. And yet I wold not, for all that, denye therebye any thing that I had spoken for the presence. And this was the some of our talke.

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"And this that I saied is so true by all sortes of men, that even D. Hardinge writeth the same, as it appeareth most evidently by his wordes reported in ye Bisshoppe of Salisburie's (Jewel's) booke, pagina 228, wich be thees: "then we maye saye, yt in the sacrament his verye bodye is present, yea, really, is to saye, in deede, substantially, that is, in substance, and corporally, carnally, and naturally; by that which wordes is ment that his verye bodye, his verye flesh, and his verye humaine nature, is there, not after corporall, carnall, or natural wise, but invisibly, unspeakably, supernaturally, spiritually, divinely, and by waye unto him only known.

"This I thought good to write to your honour for myn owne purgation. The Almightye God in Christ restore yow to your old health, and longe keepe yow in the same, with encrease of vertue and honour.

"Yours whole to his poor powre,

EDM. ROFFENS.

"Endorsed.—22 December, 1556, B. of Rochester to myself.

"Superscribed.—To the Right Honourable and his singler good freind Sir Willm. Cecill, knight, principal Thresaure to ye Queen's Matie." (1)

The Homily "concerning the sacrament" speaks of faith being "a necessary instrument;" the article had spoken of it as "a mean." May it not be said to have this signification: a "necessary instrument" or "a mean" of *beneficial* reception, or what the Homily calls "fruition" of "a ghostly *substance?*" Is such a construction at all events wholly inadmissible, and does it subject the holder of the theory to punishment?

The alterations effected in the holy communion service after the second Prayer Book of Edward VI., both in the reign of Elizabeth and Charles II., were certainly not unfavourable to those who maintained a real, or, as it is not uncommonly designated, an objective presence in the eucharist. I do not dwell on the marginal rubrics, with respect to manual rites, or the position of the priest before the table. But I come first to the important addition made to the language which the priest is directed to use when he delivers the holy elements to the communicants. It cannot, I think, be reasonably doubted, that the substitution of the words, "Take and eat this in remembrance that Christ died for thee, and feed on him in thy heart by faith with thanksgiving," for 'The body of our Lord Jesus Christ which was given for thee, preserve thy body and soul unto everlasting life," and the substitution of "Drink this in remembrance that Christ's blood was

(1) Cited in Pusey, "On the Real Presence," p. 203, ed. 1857, also printed separately in a pamphlet.

shed for thee, and be thankful," for "The blood of our Lord Jesus Christ, which was shed for thee preserve thy body and soul unto everlasting life," was intended to give a greater prominence to the commemorative character of the rite, and to avoid as much as possible the recognition of the presence. Queen Elizabeth insisted on the restoration of the discarded sentences, and ever since the two have been joined together in the service of the holy communion. The part of the catechism introduced in the reign of James I. relative to the holy eucharist, according to the plain meaning of the words, favours the doctrine of the real presence in the holy elements.

In the Canons of 1603, it is said (Canon 57) that "the doctrine both of baptism and the Lord's Supper is so sufficiently set down in the Book of Common Prayer to be used at the administration of the said sacraments as nothing can be added unto it that is material and necessary."

The directions for the reverent consumption of the unconsumed elements, and for covering them with a fair linen cloth, seem to indicate increased reverence for this sacrament. But the next matter of importance is the alteration in, what is commonly, but improperly, called the Black Rubric, i.e., the declaration on kneeling at the close of the communion service. This declaration, which contains an apology for the kneeling posture of the communicants, found its way, under the religious influences which then prevailed, into the second Prayer Book of Edward VI. It specified that "no adoration was done or ought to be done either unto the sacramental bread and wine there bodily received, or unto any *real and essential* presence there being of Christ's natural flesh and blood." Queen Elizabeth omitted this declaration altogether from her prayer-book. There can be no doubt that she did so because it was an obstacle to the communion of the Lutherans and Roman Catholics in our Church, as well as because, rightly or wrongly, she interpreted it as adverse to the doctrine of the presence.

Upon this point we have the consentient voice of two rival historians. Collier says, that Queen Elizabeth's council, on her accession, impressed upon her, that "To prevent discontent the

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reformed liturgy ought to be reviewed and made as inoffensive to all parties as may be;" Burnet, that the Queen inclined "To have the manner of Christ's presence in the sacrament left in some general words, that those who believed the corporal presence might not be driven away from the Church by too nice an explanation of it." (1)

"Corporal" is not equivalent "to real and essential" (as Mr. Keble truly remarks). "It is not only associated with grosser and more carnal ideas, but in its strict philosophical meaning implies also something local, in the sense of filling a certain space, *οἰκείαν περιγράφην*. The form of His glorious body 'real,' 'substantial,' 'essential,' imply nothing of the kind. They express our faith in the miracle, without in the least pretending to indicate the manner of it." (2)

At the Savoy Conference in 1661, the Presbyterians desired the restoration of the declaration, and the bishops opposed it, but eventually consented to its restoration, with an alteration of the most material character, namely, the substitution of the words "*corporal* presence of Christ's *natural* flesh and blood," for the words "real and essential presence there being, &c."

It appears to me that the principle of legal construction applicable to this grave and deliberate alteration is clear, namely, that it was intended to exclude, in conformity with the articles, that gross mode of presence which is called transubstantiation, but to admit the "real and essential presence," which the second Prayer Book of Edward VI. had excluded.

The alterations which a party in the Church, and the Dissenters from without, after the accession of William and Mary, endeavoured in 1689 to effect in the prayer-book, point to the same result.

The catechism appeared to express so strongly, as Bishop Hampden has observed, the Catholic doctrine as to the sacraments, that those who did not adopt that doctrine were naturally anxious to alter the language of the catechism. They did not succeed;

(1) Collier's Ecclesiastical History, Hist. Reformation, vol. ii. Book III. vol. ii. p. 411, fol. 1714.—Burnet's p. 753.

(2) Keble on Euch. Ador. p. 137.

but the table which follows represents the attempts that they made with respect to the holy eucharist.

Alterations in the Book of Common Prayer in 1689.

(452.) The question.] What is the outward part or sign of the Lord's Supper?	Altered.] What are ye outward and visible signs in the Lord's Supper?
(453.) The question.] What is the inward part or thing signified?	Altered.] What are the things signified by ye bread and wine?
(454.) In the answer, "The body and blood of Christ," &c.] are verily and indeed taken and received by the faithful in the Lord's Supper.	Struck out and altered thus.] Were offered for us upon ye cross once for all.
(455.) The following question.] What are the benefits whereof we are partakers thereby?	Struck out, and the following additions substituted, which are so constructed as to join on with the answer to that question.] Question.] What is ye inward and spiritual grace? Answer.] The benefits of ye sacrifice of Christ's body and blood, which are verily and indeed taken and received by ye faythful in ye Lord's Supper. (1)

With respect, therefore, to the charges in the criminal articles against Mr. Bennett, for describing the presence in the holy eucharist as "actual" and "objective," I must hold that by the use of these expressions he has not contravened the formularies of our church, or committed any ecclesiastical offence.

Doctrine of the sacrifice.

Under the second category of the alleged offences of the defendant, I find the following charges:—

(1.) That the holy communion table is an altar of sacrifice, at which the ministering priests of the Church appear in a *sacerdotal position* at the celebration of the holy communion, and that at such celebration there is a great sacrifice or offering of Jesus Christ by the ministering priest, and that in such sacrifice or offering the mediation of Jesus ascends from such altar to plead for the sins of men.

(2.) That the holy communion table is an altar of a sacrificial character, at which the ministering priests of the Church discharge a *sacerdotal office* at the celebration of the holy communion, and that at such celebration there is a living, real, and spiritual offering of Christ by the ministering priest.

(1) House of Commons Return, 1854.

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In the extract from Mr. Bennett, contained in Article 5, lettered A, he speaks of "sacerdotal representation at her altars;" he has before spoken of the "episcopal representation of the Church in the House of Lords." By the term "sacerdotal representation" is meant, I suppose, the officiating of the priest at the holy table; the Latin word has been used instead of the Saxon, and the language is vague, but I find nothing necessarily at variance with the doctrine of the Church of England in the use of the expression.

In passage B. the defendant speaks of "the doctrine of sacrifice" and of "the idea of a sacrifice in the blessed eucharist." In various passages he speaks of "the eucharistic sacrifice;" in passage E., of "the sacrificial character of the altar;" in passage G., of a "living real spiritual offering of Christ upon the altar;" and in passage L., of "the sacrifice offered by the priest in the holy eucharist."

Passage D. is as follows:—

at pages 12 and 13.

(D.) The priest or priest and deacon formerly standing with faces opposite each other, and leaning over the altar in apparently amicable conference, now appear in their sacerdotal position, as though they were in reality occupied in the great sacrifice which it is their office to offer. Formerly, an ordinary surplice, and frequently not over clean or seemly, covered the person of the ministering priest, no difference being manifested between that and all other offering of prayer; now the ancient vestments present to crowds of worshippers the fact, that here before God's altar is something far higher, far more awful, more mysterious, than aught that man can speak of, namely, the presence of the Son of God in human flesh subsisting. And towards this are tending all the ancient rites of the church which are now in course of restoration. The solemn music and the smoke of the incense go up before God, assuring the world that here is no appearance only of love, but a reality and a depth which human hearts cannot fathom, nor even the angels themselves. The incense is the mediation of Jesus ascending from the altar to plead for the sins of man.

As this extract appears to me to be the most explicit, if such a word be applicable to any of Mr. Bennett's statements, with respect to the offence charged, I have cited it *in extenso*. It contains, I think, these propositions; that there is a "great sacrifice," which it is the office of the priest to offer, to which his position at the altar has reference; that the dresses of the priests are calculated to apprise the worshippers of "the presence of the Son of God in human flesh subsisting," as to the use of which words I have

already expressed my opinion; that the rites of music and incense tend to symbolize this presence, and to represent the reality and depth of God's love; and that the incense further or especially represents the mediation of our Lord ascending from the altar. With respect to the propositions relating to the symbolical character of vestments and rites, no specific charge is made; and with respect to the use of incense at the time of the holy communion, a judgment prohibitory of it has been delivered by me since these passages were written. But I must observe here that the sentence, "The incense is the mediation of Jesus ascending from the altar to plead for the sins of man," is a statement as to the symbolical use of incense, and *per se* does not contravene the doctrine of the Church. What is here predicated of incense is not necessarily connected with the doctrine of a sacrifice, but rather, as it would seem to me, with the doctrine of the presence; and therefore that part of the charging article, which, omitting all mention of incense, applies the words as to the mediation of Jesus ascending from the altar to the doctrine of a sacrifice is founded on a construction of the words of the defendant which they do not necessarily bear. This part of the charge, therefore, is, I think, not well laid; but, if it were, it would be only an aggravation of the charge with respect to the doctrine of a sacrifice.

It appears to me that the articles of charge are in other respects well founded.

The law on this subject is mainly contained in the 31st Article of religion:—

> The offering of Christ once made is that perfect redemption, propitiation, and satisfaction for all the sins of the whole world, both original and actual; and there is none other satisfaction for sin but that alone. Wherefore, the sacrifices of masses, in the which it was commonly said that the priest did offer Christ for the quick and the dead, to have remission of pain or guilt, were blasphemous fables and dangerous deceits.

With this should be contrasted the Canons of the Council of Trent:—

> Can. I. Si quis dixerit, in missa non offerri Deo verum et proprium sacrificium, aut quod offerri non sit aliud quam nobis Christum ad manducandum dari: anathema sit. (1)
>
> Can. III. "Si quis dixerit missæ sacrificium tantum esse laudis et gratiarum

(1) Canones, &c. Concilii Tridentini, Sess. xxii.

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actionis, aut nudam commemorationem sacrificii in cruce peracti, non autem propitiatorium; vel soli prodesse sumenti; neque pro vivis et defunctis pro peccatis, pœnis, satisfactionibus et aliis necessitatibus offerri debere: anathema sit. (1)

I have therefore to consider, first, whether the doctrine of a sacrifice as connected with the eucharist, be in every sense forbidden by the law of the Church; secondly, whether if the Church admit in any sense the doctrine of a sacrifice, the passages extracted contain such a sense of that doctrine as it does not admit.

To deal with the first point first:—

I have been referred to the case of *Liddell* v. *Westerton* (2) as a judgment of the Privy Council upon this point. It is said that this decision established that the use of the term "sacrifice," as applied in any way to the eucharist, was unlawful. I am unable to take that view of the judgment, for various reasons:—

First, the question as to the lawfulness of the term had never been raised in the argument, and a decision upon it was not necessary for the issue in the cause. If this point had been argued it would have been shewn, no doubt, that the authority of Cudworth principally in the absence of argument, relied upon by the Court, was opposed, not only to the great learning and authority of Mede, of Grabe, of Andrewes, of Laud, of Jackson, and the yet greater authority of one whom Waterland himself called—while dissenting from his opinion—"the incomparably learned and judicious," Bishop Bull. (3)

Secondly,—Since the observations on this point in *Liddell* v. *Westerton* (2), a flood of learning has been poured out upon the subject by the very learned treatises of Dr. Pusey, Mr. Keble, the "Bampton Lectures" of Bishop Moberly, the essay of Archdeacon Churton, and other works; and when I remember how much effect was ascribed by the Privy Council to a treatise of Dr. Story, which examined with great learning the law as to bills of exchange, and disapproved of former decisions of the Court of Queen's Bench on this subject (4), I am sure not less effect would be ascribed by that tribunal to the treatises which have since

(1) Canones, &c. Concilii Tridentini, Sess. xxii.

(2) Moore's Special Report.

(3) Waterland's Works, vol. vii. p. 343, ed. 1823.

(4) *Allen* v. *Kemble*, 6 Moo. P. C. 323.

examined with at least equal learning this difficult subject, then, perhaps, as in the case of the bills of exchange, by comparison, but superficially considered.

Thirdly,—The judgment of the Privy Council did not in fact pronounce even any obiter dictum, as to the lawfulness of the use of this term in a particular or metaphorical sense. Even Waterland, whom Archdeacon Churton describes as not impressed with the "higher and deeper sacramental truths," observes:—

> Nevertheless, the sacrament of the eucharist has more particularly obtained the name of *sacrifice*, partly on account of the *offerings* to church and poor in the *ante-oblation*, which are *peculiar* to that sacrament, and partly on account of the commemorated *sacrifice* in the *post-oblation*. For though baptism commemorates the *death* and *burial*, and indirectly the *grand sacrifice*, yet it does not so precisely, formally, and directly represent or commemorate the *sacrifice of the cross* as the eucharist does. (1)

There are several other passages, both in his work "A Review of the Doctrine of the Eucharist as laid down in Scripture and Antiquity," and in his charge to the Middlesex clergy, entitled "The Christian Sacrifice explained, with an Appendix," where he maintains a similar doctrine. Indeed, upon this point, namely, the existence of a sacrifice in some sense, as connected with the eucharist, it would be easy to accumulate authorities from the divines of our Church. But, as Waterland may be considered as

(1) Waterland's Works, vol. viii. p. 223, ed. 1823:—

"The value of this treatise of Waterland's will be found to consist in the clear refutation it supplies to the leading Socinian glosses on the doctrine of the eucharist, reducing it, as it speaks, to a bare memorial of an absent friend. When he comes to deal with higher and deeper sacramental truths, he is no longer persuasive, often no longer trustworthy. He could vindicate the testimony of Holy Scripture concerning the divine persons, but seems to have seen nothing mysterious in that solemn rite which was given to make men partakers of the divine nature. It was the tendency of the cold age in which he lived, when even persons of well-regulated lives, and not altogether destitute of piety, could approve of the poor sophism of 'modest Foster,' or one of his admirers.

"Where mystery begins, religion ends. It was Waterland's great misfortune, in other respects as well as in writing on this great subject, that he was altogether unacquainted with the writings of one who is, perhaps, the very first of English divines, the most profound and copious reasoner in divine things, the devout and learned Dr. Thomas Jackson." — Supplement to Waterland's Works. Fourteen Letters from Daniel Waterland to Zachary Pearce, &c., by Edward Churton, M.A., Archdeacon of Cleveland (1868, p. xxxiii. (Preface).

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the most prominent master of this school, I content myself with his authority.

I am led therefore to the certain conclusion, that it is lawful for a clergyman to speak in some sense of the eucharistic sacrifice, and therefore, in some sense, also of the "sacrifice offered by the priest," and "the sacrificial character" of the holy table. Much of Mr. Bennett's language would fall under these categories, upon the ordinary principles of construction, by which alone in this criminal suit I must be guided. With respect to any language which may be considered to go beyond this limit, I must see whether it exceeds the liberty which, according to the judgments of the Privy Council, I must hold to be accorded to all clergymen in cases where the formularies are not express, imperative, and susceptible of but one interpretation.

Authorities on the use of the term "Sacrifice."

In Dr. Smith's "Dictionary of the Bible" will be found a learned article on "Sacrifice"; it ends with these words:—

Such is the brief sketch of the doctrine of sacrifice. It is seen to have been deeply rooted in men's hearts, and to have been from the beginning accepted and sanctioned by God, and made by him one channel of his revelations. In virtue of that sanction it has a value partly symbolical, partly actual, but in all respects derived from the true sacrifice of which it was the type. It involved the expiatory, the self-dedicatory, and the *eucharistic* ideas each gradually developed and explained, but all capable of full explanation by the light reflected back from the anti-type. [Signed "A. B.," (Alfred Barry, M.A., head master of the Grammar School, Leeds; late Fellow of Trinity College, Cambridge).] (1)

The first authority to which I will refer is that of Ratramn, quoting St. Augustine.

Nonne semel *immolatus* est Christus in seipso; et tamen in sacramento non solum per omnes Paschæ solemnitates; sed omni die populis *immolatus?* Nec utique mentitur qui interrogatus, eum responderit *immolari.* Si enim sacramenta quandam similitudinem rerum earum, quarum sacramenta sunt, non haberunt omnino sacramenta non essent. (2)

Again:—

Quod semel fecit nunc quotidie frequentat. Semel enim pro peccatis populi se obtulit: celebratur tamen hæc eadem oblatio singulis, per fideles, diebus, sed in mysterio: ut quod Dominus Jesus Christus, semel se offerens, adimplevit, hoc, in eius passionis memoriam, quotidie geratur per mysteriorum celebrationem. Nec

(1) Smith's "Dictionary of the Bible," vol. iii. p. 1083.

(2) Bertrami de Corpore et Sanguine Domini, &c., pp. 27, 28.

tamen falsò dicitur quod in mysteriis illis, Dominus vel immoletur vel patiatur: quoniam illius mortis atque passionis habent similitudinem, quarum existent representationes. Unde Dominicum corpus et sanguis Dominicus appellantur: quoniam eius sumunt appellationem, cujus existunt sacramentum. (1)

The next authority is Bishop Ridley, who says:—

For as St. Augustin saith, in his 20th book, "Christ's flesh and blood was in the Old Testament promised by similitudes and signs of their *sacrifices*, and was exhibited in deed and in truth upon the cross, but the same is celebrated by a sacrament of remembrance upon the altar." (2)

Again:—

And in his book, "De Fide ad Petrum," cap. 19, he saith, that "in these sacrifices (meaning of the old law) it is figuratively signified what was then to be given; but in this sacrifice it is evidently signified, what is already given (understanding *in the sacrifice upon the altar*) the remembrance and thanksgiving for the flesh which he offered for us upon the cross," as in the same place evidently there it may appear. (3)

Again:—

Was Christ (saith St. Augustine) offered any more but once? And he offered himself. And yet in a sacrament or representation, not only every solemn feast of Easter, but also every day to the people he is offered. So that he doth not lie, that saith, "He is every day offered." For if sacraments had not some similitude or likeness of those things whereof they be sacraments, they could in no wise be sacraments, and for their similitudes and likeness commonly they have the names of the things whereof they be sacraments. Therefore, as after a certain manner of speech the sacrament of Christ's body *is* Christ's body, the sacrament of Christ's blood *is* Christ's blood, so likewise the sacrament of faith *is* faith. (4)

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(1) Bertrami de Corpore et Sanguine Domini, &c., p. 31.

(2) Hujus sacrificii caro et sanguis ante adventum Christi per victimarum similitudinem promittebatur, in passione Christi per ipsam veritatem reddebatur, post adscensum Christi per sacramentum memoriæ celebratur—S. Aug. cont. Faust. lib. xx. c. 98. Op. Ed. Ben. Par. Tom. viii. col. 348.

(3) "Works of Bishop Ridley," p. 40.—In illis enim carnalibus victimis figuratio fuit carnis Christi, quam pro peccatis nostris ipse sine peccato fuerat oblaturus, et sanguinis quem erat effusurus in remissionem peccatorum nostrorum; in isto autem sacrificio gratiarum actio atque commemoratio est carnis Christi quam pro nobis obtulit et sanguinis quem pro nobis idem deus effudit.—Fulgentius, Edit. Lug. 1633.

(4) Ridley's Works, pp. 40, 41.—"Nonne semel immolatus est Christus in seipso? et tamen in sacramento non solum per omnes Paschæ solemnitates, sed omni die populis immolatur, nec utique mentitur qui interrogatus eum responderit immolari. Si enim sacramenta quandam similitudinem earum rerum quarum sacramenta sunt, non haberunt, omnino sacramenta non essent; ex hâc autem similitudine plerumque etium ipsarum reram nomina accipiunt. Sicut ergo, secundum quemdam modum, sacramentum corporis Christi corpus Christi est, sacramentum

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Again:—

These Scriptures do persuade me to believe that there is no other oblation of Christ (albeit I am not ignorant there are many sacrifices), but that was once made upon the cross.

The testimonies of the antient fathers which confirm the same are out of Augustine ad. Bonifac., Epist. 23. Again, in his Book of Questions, in the 61st Question. Also in his book against Faustus the Manichee, Book XX., chap. 21. And in the same book against the said Faustus, chap. 18, thus he writeth: "Now the Christians keep a memorial of the sacrifice past, with a holy oblation and participation of the body and blood of Christ." Fulgentius, in his book "De Fide," calleth the same oblation a commemoration. (1)

Thorndike says:—

But if it be manifest that, by the sacrament of the eucharist, God pretends to tender us the communion of the sacrifice of Christ upon the cross, then there is *another* presence of the body and blood of our Lord in the sacrament, *beside* that spiritual presence in the soul which that living faith effecteth without the sacrament as well as in the receiving of it.

Which kind of presence, you may, if you please, call the *representation* of the sacrifice of Christ; so as you understand the word "representation" to signify not the figuring or resembling of that which is only signified, but as it signifies in the Roman laws, when a man is said "repræsentare pecuniam," who pays ready money; deriving the signification of it *a re præsenti* not from the preposition *re* which will import not the presenting of that again to a man's senses which is once past, but the tendering of that to a man's possession which is tendered him on the place. (2)

Bishop Brevint, on the question of the sacrament being a commemorative sacrifice, says:—

There never was on earth a true religion without some kind of sacrifices. . . . . Nevertheless this sacrifice, which by a real oblation was not to be offered more than once, is by an eucharistical and devout commemoration to be offered up every day. This is what the Apostle calls "to set forth the death of the Lord;" to set it forth, I say, as well before the eyes of God his Father, as before the eyes of all men; and what St. Austin did explain when he said that the holy flesh of Jesus Christ was offered up in three manners, by prefiguring sacrifices under the law before his coming into the world; in real deed upon the cross; and by a commemorative sacrament after He is ascended into heaven. All comes to this; first, that the sacrifice, as it is itself and in itself, can never be reiterated; yet by way of devout celebration and remembrance, it may nevertheless be reiterated every

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sanguinis Christi sanguis Christi est; ita sacramentum fidei fides est."—S. Aug. Epist. xxiii., Op. Ed. Ben. vol. ii. col. 267, F.

(1) Ridley's Works, p. 178.—Unde jam Christiani peracti ejusdem *sacrificii* memoriam celebrant sacrosancta oblatione et participatione corporis et sanguinis Christi.—S. Aug. Ibid. c. 18.

(2) Laws of the Church, Book III., chap. ii. p. 10.

day. Secondly, that whereas the holy eucharist is by itself a sacrament, wherein God offers unto all men the blessings merited by the oblation of his Son, it likewise becomes by our remembrance a kind of sacrifice also; whereby, to obtain at his hands the same blessings, we present and expose before his eyes that same holy and precious oblation once offered. (1)

But now, under the Gospel, other kinds of sacrifices are required. We are now commanded to "present our bodies a living sacrifice;" not to kill them, but to offer them up alive as a living sacrifice, dedicating ourselves wholly to the service of God. Hence all manner of good, pious, and charitable works that are done in obedience to God, and for his service and honour, are now called "sacrifices," . . . . particularly our open or public praying to him, and to him alone, for all the good things that we want. For hereby we plainly discover that we believe him to be the author and giver of "every good and perfect gift." . . . . And, therefore, under the law itself their public prayers always went along with their daily sacrifices, both morning and evening. "Let my prayer," saith David, "be set forth before Thee as an incense, and the lifting up of my hands as an evening sacrifice." Especially considering that prayer always was and ought to be accompanied with praise and thanksgiving to God, which is so properly a sacrifice that it is often called by that name. "I will offer," saith David, "to Thee the sacrifice of thanksgiving" (Ps. cxvi. 17); and let them sacrifice the sacrifices of thanksgiving, and declare his works with rejoicing or singing (Ps. cvii. 12). But the sacrifice that is most proper and peculiar to the Gospel is the sacrament of the Lord's Supper, instituted by our Lord himself, to succeed all the bloody sacrifices in the Mosaic law. For though we cannot say, as some do, that this is such a sacrifice whereby Christ is again offered up to God both for the living and the dead,

The words which follow are important:—

yet it may as properly be called a sacrifice as any that was ever offered, except that which was offered by Christ himself; for his, indeed, was the only true expiatory sacrifice that was ever offered. Those under the law were only types of his, and were called sacrifices simply upon that account, because they typified and represented that which he was to offer for the sins of the world; and therefore the sacrament of Christ's body and blood may as well be called by that name as they were. They were typical, and this is a commemorative sacrifice. (2)

Field, Dean of Gloucester, in 1609, says, in his "History of the Church," as follows:—

We must observe, that by the name of sacrifice, gift, or present, first the oblation of the people is meant, that consisteth in bread and wine, brought and set upon the Lord's table. In which again two things are to be considered, the outward action, and that which is signified thereby; to wit, the people's dedicating themselves and all that they have to God by faith and devotion, and offering to

(1) Brevint, "Christian Sacrament and Sacrifice." Cited in the "Eucharistica" published by the Bishop of Oxford, 1861.

(2) Bishop Beveridge, cited in the "Eucharistica," p. 202.

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him the sacrifice of praise. In this sense is the word "sacrifice" used in the former part of the canon, as I have already shewed. In respect of this is that prayer poured out to God, that He will be mindful of his servants that do offer unto him this sacrifice of praise, that is, these outward things in acknowledgment that all is of him, that they had perished if he had not sent his Son to redeem them, that unless they eat the flesh and drink the blood of Christ, they have no life; that He hath instituted holy sacraments of his body and blood, *under the forms of bread and wine*, in which He will not only represent but exhibit the same unto all such as hunger and thirst after righteousness; and therefore they desire him so to accept and sanctify these their oblations of bread and wine, which in this sort they offer unto him, that they may become unto them the body and blood of Christ, that so partaking in them they may be made partakers of Christ, and all the benefits of redemption and salvation that He hath wrought. Secondly, by the name of sacrifice is understood the sacrifice of Christ's body; wherein we must first consider the thing offered, and secondly, the manner of offering. The thing that is offered is the body of Christ, which is an eternal and perpetual propitiatory sacrifice, in that it was once offered by death upon the cross, and hath an everlasting and never-failing force and efficacy. Touching the manner of offering Christ's body and blood, we must consider that there is a double offering of a thing to God. First, so as men are wont to do that give something to God out of that they possess, professing that they will no longer be owners of it, but that it shall be his, and serve for such uses and employments as He shall convert it to. Secondly, a man may be said to offer a thing unto God, in that he bringeth it to his presence, setteth it before his eyes, and offereth it to his view, to incline him to do something by the sight of it and respect had to it. In this sort Christ offereth himself and his body once, crucified, daily in Heaven, and so intercedeth for us; not as giving it in the nature of a gift or present, for he gave himself to God once, to be holy unto him for ever; nor in the nature of a sacrifice; for he died once for sin, and rose again never to die any more; but in that he setteth it before the eyes of God his Father, representing it unto him, and so offering it to his view to obtain grace and mercy for us. And in this sort we also offer him daily on the altar, in that commemorating his death, and lively representing his bitter passions endured in his body upon the cross, we offer him that was once crucified and sacrificed for us on the cross, and all his sufferings, to the view and gracious consideration of the Almighty, earnestly desiring, and assuredly hoping, that he will incline to pity us, and shew mercy unto us, for this his dearest Son's sake, who, in our nature for us, to satisfy his displeasure and to procure us acceptation, endured such and so grievous things. This kind of offering or sacrificing Christ, commemoratively, is twofold, inward and outward; outward as the taking, breaking, and distributing the mystical bread, and pouring out the cup of blessing, which is the communion of the blood of Christ, the inward consisteth in the faith and devotion of the church and people of God, so commemorating the death and passion of Christ their crucified Saviour, and representing and setting it before the eyes of the Almighty, that they fly unto it as their only stay and refuge, and beseech him to be merciful unto them for his sake that endured all these things, to satisfy his wrath, and work their peace and good. (1)

(1) Field "History of the Church," vol. ii. pp. 60–2.

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Again in chap. XIX.:—

Of the real sacrifice of Christ's body on the altar, as a propitiatory sacrifice for the quick and the dead.

Touching the real sacrificing of Christ's body on the altar, the Church never taught any such thing as the Romanists now teach, as appeareth by these testimonies following:—

"Although," saith Biel (1), "Christ was once offered when he appeared in our flesh, he is offered, notwithstanding, daily, hidden *under the veils of bread and wine*, not touching any of those things which import punishment or suffering (for Christ is not daily wounded; he suffereth not; he dieth not); but for two other causes the consecration and receiving of the holy eucharist may be named a sacrifice and oblation; first, because it is a representation and memorial of the true sacrifice and holy oblation made on the altar of the cross; secondly, because it maketh us partakers of the effects of the same. Now, the resemblances of things, as Augustine noteth, writing to Simplicianus, are called by the names of those things whereof they are resemblances, as we are wont to say when we behold a painted table or wall, This is Cicero, this Sallustius. Whereof, seeing the celebration of this sacrifice is a lively resemblance of the passion of Christ, which is the true sacrificing of him, it may rightly be named the sacrificing of him."

"Peter Lombard, Thomas, and the other schoolmen," saith Bellarmine (2), "were not careful of that which is now in question touching the daily renewed real sacrificing of Christ, but only sought to shew how the sacrifice of the mass may be called an offering of Christ, that is, a slaying of him; and therefore, proposing the question, whether the eucharist be a sacrifice, they answer, for the most part, that it may be said to be an offering or sacrifice, because it hath a resemblance of the true and real offering which was on the altar of the cross, and because it communicateth unto us the effects of the true and real killing of Christ." (3)

Again:—

In that therefore the Church doth offer the true body and blood of Christ to God the Father, it is merely *a representative sacrifice*, and all that is done is but the commemorating and representing of that sacrifice which was once offered on the cross, but in that it dedicateth itself, which is the mystical body of Christ, unto God, it is a true, but a spiritual sacrifice, that is, an eucharistical sacrifice of praise, thanksgiving, and of obedience due unto God. Christ, therefore, is offered and sacrificed on the altar, but sacramentally and mystically; in that in the sacrament there is a commemoration and remembrance of that which was once done. Christ is not often slain, which once to think were abominable; but that which was once done is represented, that we might not forget the benefit bestowed on us, but rather be so stirred up and moved by this sacrament, as if we saw the

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(1) Expositio Missæ, Lect. LXXXV. fol. 183, *b.* Ludg. 1514.

(2) Bellarm. de Euchar. Lib. V. (sive de Missa, Lib. I.), Cap. 15, (Tom. III. p. 403. Ven. 1721.)

(3) Field "History of the Church," vol. ii. pp. 370–1.

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Lord Jesus hanging upon the cross. The passion of the Lord (saith Cyprian) is the sacrifice that we offer to God, that is, that we offer to the view of God, and represent unto him. Neither is it to be marvelled at that we offer the true body of Christ to revive the memory of the former sacrifice, and to represent it unto God, seeing the Son of God was given unto us that we might oppose him to the wrath of God as a reconciler, and that, distrusting our own strength, we might represent to the Father this most potent sacrifice. (1)

Cranmer cites Cyprian and St. Augustine on the sacrifice, without disapprobation. He says:—

For the cause why Cyprian and other old authors say that Christ made an oblation and offering of himself in his last supper, was not that he declared there that he would suffer death, for that he had declared many times before; but the cause was, that there he ordained a perpetual memory of his death, which he would all faithful Christian people to observe from time to time, remembering his death, with thanks for his benefits, until his coming again. And therefore, the memorial of the true sacrifice made upon the cross, as St. Augustine saith, is *called by the name of a sacrifice*, as a thing that signifieth another thing is called by the name of the thing which it signifieth, although in very deed it be not the same.

And the long discourse that you make of Christ's true presence, and of the true eating of him, and of his true assisting us in our doing his commandment, all these be true. For Christ's flesh and blood be in the sacrament truly present, but spiritually and sacramentally, not carnally and corporally. And, as he is truly present, so is he truly eaten and drunken, and assisteth us; and he is the same to us that he was to them that saw him with their bodily eyes. (2)

How is it possible to set out more plainly the diversity of the true sacrifice of Christ, made upon the altar of the cross (which was the propitiation of sin), from the sacrifice made in the sacrament, that Lombardus hath done in this place? For the one he calleth the true sacrifice, the other he calleth but a memorial or representation thereof; likening the sacrifice made in the Lord's Supper to a year's mind or anniversary, whereat is made a memorial of the death of a person, and yet it is not his death in deed. So in the Lord's Supper, according to his commandment, we remember his death, preaching, and commanding the same until his return again at the last day. And, although it be one Christ that died for us, and whose death we remember, yet it is not one sacrifice that he made of himself upon the cross and that we make of him upon the altar or table. For his sacrifice was the redemption of the world; ours is not so; his was death, ours is but a remembrance thereof. His was the taking away the sins of the world; ours is a praising and thanking for the same. And, therefore, his was satisfactory; ours is gratulatory. *It is but one Christ that was offered then and is offered now*, and yet the offerings be diverse; his was the thing, and ours is the figure. His was the original, and ours is, as it were, a platform. (3)

(1) Field "History of the Church," vol. ii. p. 73.

(2) Cranmer's Works, vol. iii. pp. 160–1. "Answer to Gardyner. The Presence of Christ."

(3) Cranmer's Works, vol. iii. pp. 538–9.

And now have I made it evident that Petrus Lombardus defaceth in no point my saying of the sacrifice, but confirmeth fully my doctrine, as well of the sacrifice propitiatory made by Christ himself only, as of the sacrifice commemorative and gratulatory made by the priests and people. (1)

Hipinus saith that the old fathers called the supper of our Lord a sacrifice propitiatory. I will not believe that Hipinus so said, until you appoint me both the book and place where he so saith. For the effect of this book is clean contrary, which he wrote to reprove the propitiatory sacrifice, which the papists feign to be in the mass. Thus indeed Hipinus writeth in one place: "Veteres eucharistiam propter corporis et sanguinis Christi præsentiam, primo vocaverunt sacrificium, deinde propter oblationes et munera quæ in ipsa eucharistia Deo consecrabantur et conferebantur, ad sacra ministeria, et ad necessitatem credentium." In which words Hipinus declareth that the old fathers called the supper of our Lord a sacrifice, for two considerations, one was for the presence of Christ's flesh and blood, the other was for the offering which the people gave there of their devotion, to the holy ministration and relief of the poor. But Hipinus speaketh here not one word of corporal presence, nor of propitiatory sacrifice, but generally of presence and sacrifice, which maketh nothing for your purpose, nor against me, *that grant both a presence and a sacrifice.* But when you shall shew me the places where Hipinus saith that the old fathers called the Lord's Supper a propitiatory sacrifice, I shall trust you the better and him the worse. (2)

Archbishop Sharp says:—

Now to the same use and purpose (say we) serves our sacrament of *the Lord's Supper;* or, as it was called by the ancients, the *Christian sacrifice.* Not that we pretend in our communions to offer up the real *body* and *blood* of Christ in sacrifice to God, as the Papists do; for that (as the Apostle tells us) was once done by himself upon the cross, *and by that one offering he hath for ever perfected all them that are sanctified;* so that there is no need of any such offering, any more. But we *commemorate* that sacrifice which Christ has on this day made for us, and we thank God for it; and we heartily beseech him, that He would accept of it on our behalf, and that it may make atonement for all our sins. And we likewise feed upon it (as the Jews did upon their *sacrifices*); that is to say, by *eating* of that *bread* which he made to be his *body*, and drinking of that *cup* which he made to be his *blood.* Now, in doing of this, we may be truly said both to offer up a sacrifice to God, and likewise to keep a *feast* upon this sacrifice. We offer up by *commemoration* and *thanksgiving* and hearty prayer, that *sacrifice* that was once offered by Jesus Christ at *Jerusalem*, near seventeen hundred years ago, for the salvation of all mankind; and we partake both of the *body* and *blood* of that his sacrifice, by partaking of the *bread* and *wine* that he has consecrated not only to be the *symbols* and *signs* of them, but to convey the real benefits of his *passion* and *sacrifice* to all believers. So that we may be truly said to *feed* at God's table whenever we receive the sacrament. (3)

To come to the other sacrament (says Bishop Bull), the eucharist, or holy

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(1) Cranmer's Works, vol. iii. p. 540.

(2) Cranmer's Works, vol. iii. pp. 551–2. "The Sacrifice of Christ."

(3) Archbishop Sharp's Sermons, vol. ii. p. 153. (Sixth Sermon.)

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supper; this is the most sacred and mysterious rite, the apex, the top and perfection of Christian worship, as the ancients term it, and therefore it ought to be performed with the greatest reverence and solemnity in every punctilio of it, according to the direction of our Church in her rubric to the communion office. (1)

This great luminary of our Church treated the question of sacrifice, in his answer to Bossuet, distinguishing between the Roman sacrifice of the mass and the Catholic sacrifice of the holy eucharist.

But alas! he says, these supperadded articles of the Trent Creed are so far from being certain truths, that they are most of them manifest untruths, yea, gross and dangerous errors. To make this appear, I shall not refuse the pains of examining some of the chief of them.

The first article I shall take notice of is this: "I profess that in the mass is offered to God, a true, proper, and propitiatory sacrifice for the living and the dead; and that in the most holy sacrament of the eucharist there is truly, and really and substantially, the body and blood, together with the soul and divinity of our Lord Jesus Christ; and that there is wrought a conversion of the whole substance of the bread into the body and of the whole substance of the wine into the blood, which conversion the Catholic Church calls transubstantiation." Where this proposition ("that in the mass there is offered to God a true, proper, and propitiatory sacrifice for the living and the dead"), having that other of the "substantial presence of the body and blood of Christ in the eucharist" immediately annexed to it, the meaning of it must necessarily be this, that in the eucharist the very body and blood of Christ are again offered up to God as a propitiatory sacrifice for the sins of men. Which is an impious proposition, derogatory to the one full satisfaction of Christ made by his death on the cross, and contrary to express Scripture (Heb. vii. 27, and ix. 12, 25, 26, 28, and x. 12, 14). It is true the eucharist is frequently called by the ancient fathers *πρόσφορα*, *θυσία*, an *oblation*, a *sacrifice*. But it is to be remembered, that they say also it is *θυσία λογικὴ καὶ ἀναίμακτος*, *a reasonable sacrifice*, a *sacrifice without blood*, which, how can it be said to be, if therein the very blood of Christ was offered up to God?

They held the eucharist to be a commemorative sacrifice, and so do we. This is the constant language of the ancient liturgies, "We offer by way of commemoration;" according to our Saviour's words when he ordained this holy rite, *Do this in commemoration of me.*

In the eucharist then Christ is offered, not hypostatically, as the Trent Fathers have determined, for so he was but once offered, but commemoratively only; and this commemoration is made to God the Father, and is not a bare remembering or putting ourselves in mind of him. For every sacrifice is directed to God, and the oblation therein made, whatsoever it be, hath him for its object, and not man. In the holy eucharist, therefore, we set before God the bread and wine, "as figures or images of the precious blood of Christ shed for us, and of his precious body," (they are the very words of the Clementine Liturgy), and plead to God the merit

(1) Bishop Bull, vol. ii. p. 22. "Discourse on the Pastoral Office."

of his Son's sacrifice once offered on the cross for us sinners, and in this sacrament represented, beseeching him for the sake thereof to bestow his heavenly blessings on us.

To conclude this matter. The ancients held the oblation of the eucharist to be answerable in some respects to the legal sacrifices, that is, they believed that our blessed Saviour ordained the sacrament of the eucharist as a rite of prayer and praise to God, instead of the manifold and bloody sacrifices of the law. That the legal sacrifices were rites to invocate God by is evident from many texts of Scripture; see especially 1 Sam. vii. 9 and xiii. 12, Ezra vi. 10, Prov. xv. 8; and that they were also rites for praising and blessing God for his mercies appears from 2 Chron. xxix. 27. Instead, therefore, of slaying of beasts and burning of incense, whereby they praised God and called upon his name under the Old Testament, the Fathers, I say, believed our Saviour appointed this sacrament of bread and wine as a rite whereby to give thanks and make supplications to his Father in his name. This you may see fully cleared and proved by the learned Mr. Mede, in his treatise entitled "*The Christian Sacrifice.*" The eucharistical sacrifice thus explained is indeed λογικὴ θυσία, a *reasonable sacrifice*, widely different from that monstrous sacrifice of the mass taught in the Church of Rome.

The ancient doctors, yea, and liturgies of the Church, affirm the eucharist to be *incruentum sacrificium*, "a sacrifice without blood," which it cannot be said to be, if the very blood of Christ were therein present and offered up to God. (1)

Bishop Wilson, on this subject, says:—

Lord's Supper.

Private devotions at the altar, taken out of the most ancient offices of the Church, to render our present Communion Service more agreeable to apostolic usage, and more acceptable (I hope) to God, and beneficial to all that partake thereof, until it shall please God to put it into the hearts and power of such as ought to do it, to restore to us the first service of Edward VI., or such as shall be more conformable to the appointment of Christ and his Apostles, and their successors. Which may the Divine Majesty vouchsafe to grant for his sake who first ordained this holy sacrament. Amen.

Before Service begins, kneeling at the Altar.

May it please thee, O God, who hast called us to this ministry, to make us worthy to offer unto thee *this sacrifice* for our own sins, and for the sins of thy people. (2)

Upon placing the Bread and Wine upon the Altar.

Vouchsafe to receive these thy creatures from the hands of us sinners, O thou self-sufficient God! who remembered us when we were without hope and without God in the world, and hath made us thy brethren and heirs of thy kingdom. *May I atone thee, O God, by offering to thee the pure and unbloody sacrifice which thou hast ordained by Jesus Christ, Amen.*

But how should I dare to offer thee this sacrifice, if I had not first offered myself a sacrifice to thee, my God.

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(1) Bishop Bull, vol. ii. p. 251. The answer to the Bishop of Meaux's Corruptions of the Church of Rome, in Queries.

(2) Sacra Privata, p. 104. (Oxford Edition, 1854).

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May I never offer the prayers of the faithful with polluted lips, nor distribute the bread of life with unclean hands.

I acknowledge and receive thee, O Jesus, as sent of God, a prophet, to make his will known to us, and his merciful purpose to save us; as our priest who offered himself an acceptable sacrifice for us to satisfy the divine justice, and to make intercession for us; and as our king to rule and defend us against all our enemies. (1)

Immediately after the Prayer of Consecration.

We offer unto thee, our King and our God, this bread and this cup.

We give thee thanks for these and for all thy mercies; beseeching thee to send down thy Holy Spirit upon *this sacrifice*, that He may make this bread the body of thy Christ, and this cup the blood of thy Christ; and that all we, who are partakers thereof, may thereby obtain remission of our sins, and all other benefits of his passion. (1)

Saint Cyprian had written in one of his letters the following passage on the sacrifice in the eucharist:—

Si Jesus Christus, Dominus et Deus noster, ipse est summus sacerdos Dei Patris, et *sacrificium* Patri seipsum primus obtulit, et hoc fieri in sui commemorationem præcepit; utique ille sacerdos vice Christi vere fungitur, qui id, quod Christus fecit, imitatur, et sacrificium verum et plenum tunc offert in Ecclesia Deo Patri, si sic incipiat offerre secundum quod ipsum Christum videat obtulisse. (2)

And Waterland thus deals with this passage:—

I shall now pass on to Cyprian, to show how this matter stood, upon the *change* of language introduced in his time. We shall find him plainly speaking of the offering Christ's *body and blood*. This must be understood of an oblation subsequent to consecration, not in order to it; for Christ's body and blood, whether real or symbolical, are holy, and could want no sanctification or consecration. He further seems to speak of offering Christ himself, in this sacrament, unto God, but *under the symbols of consecrated bread and wine*. That may be his meaning, and the meaning is good, when rightly apprehended; for there was nothing new in it but the language or the manner of expression. What the elder Fathers would have called, and did call, the *commemorating* of Christ, or the *commemorating* his *passion*, his *body* broken, or *blood* shed, that Cyprian calls the *offering* of Christ, or of his *passion*, &c., because, in a large sense, even *commemorating* is *offering*, as it is presenting the thing or the person so commemorated in the way of prayer and thanksgiving before God. I do not invent this account for the clearing a difficulty, but I take it from Cyprian himself, whose own words shew that the eucharistical *commemoration* was all the while in his mind, and that that was all he meant by the oblation which he there speaks of, using a new name for an old thing. I shall shew in due time, that the later Fathers, who followed Cyprian's language in this particular, and who admitted this *third oblation* (as some have called it) as well as he, yet when they came to

(1) Sacra Privata, p. 106. (Oxford Edition, 1854).

(2) Cyprian, Ep. lxiii. p. 609, cited in Waterland's Works, vol. vii. p. 375.

explain interpreted it to mean no more than a solemn *commemoration*, such as I have mentioned. (1)

This is not the place to examine critically what the ancients meant by the *sacrifice* or *sacrifices* of the eucharist; it will deserve a distinct chapter in another part of this work. But, as I before observed of oblation, that, anciently, it was understood sometimes of the *lay offering*, the same I observe now of *sacrifice;* and it is plain from Cyprian. Besides that notion of sacrifice, there was another, and a principal one, which was conceived to go along with the *eucharistical* service, and that was, the notion of *spiritual sacrifice*, consisting of many particulars, as shall be shewn hereafter; and it was on the account of one, or both, that the eucharist had the name of *sacrifice* for the two first centuries. But by the middle of the third century, if not sooner, it began to be called a *sacrifice*, on account of the *grand sacrifice* represented and commemorated in it; the *sign*, as such, now adopting the name of the *thing signified*. In short, the *memorial* at length came to be called a *sacrifice*, as well as an *oblation;* and it had a double claim to be so called; partly as it was in itself a *spiritual* service, or *sacrifice*, and partly as it was a representation and commemoration of the high tremendous *sacrifice* of Christ God-man. This last view of it, being of all the most awful and most endearing, came by degrees to be the most prevailing acceptation of the *Christian sacrifice*, as held forth in the eucharist. But those who styled the eucharist a *sacrifice* on that account, took care, as often as need was, to explain it off to a *memorial* of a sacrifice rather than a strict or proper *sacrifice*, in that precise view. Cyprian, I think, is the first who plainly and directly styles the eucharist a *sacrifice* in the *commemorative* view, and as *representing* the grand sacrifice. Not that there was anything *new* in the *doctrine*, but there was a *new application* of an old name, which had at the first been brought in upon other accounts. (2)

Hey, in his Lectures on the Articles, says:—

It may be objected, that the Gospel Institutions are not to be made complicated and abstruse unnecessarily. Is not the "simplicity that is in Christ" best observed by taking the sacrament of the Lord's Supper as a *mere commemoration?* Bishop Cleaver answers this objection in his first discourse; and Dr. Balguy answers it, in effect, in his Seventh Charge. If you make the Lord's Supper, as it was instituted by Christ, a mere commemoration, you make it a strange and unintelligible rite; for what can be more strange than eating the flesh and drinking the blood of one who is to be regarded only as an instructor and benefactor? If we had been ordered in the sacrament to kill an animal, and shed its blood, or only to break bread, and pour out wine; the rite would be intelligible, as a simple memorial. It would have represented Christ's death, merely *as* a death; but it would have been a *different* rite from ours. Now conceive it as a feast on a *sacrifice*, and all is easy and simple. We, indeed, are not in the habit of sacrificing; but what is that? Who could not understand, that, when sacrifices were in use, part of the victim was served up at a religious *feast;* and all who partook of the material feast were understood to partake of the spiritual benefits of the

(1) Waterland's Works, vol. vii. p. 30.

(2) Waterland's Works, vol. vii. p. 37–8.

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sacrifice. Christ was our victim; on his body we do not feast literally, because it is in heaven; but he appointed bread to represent it. On that we can feast, and so partake of his body; that is, feast upon the victim. Such bread is "the Bread of Life," because, by his own appointment, it represents his *flesh*. This appears to me plain and *simple*. (1)

I will now advert to the language of Mr. Keble, in his work on "Eucharistical Adoration," published in 1857:—

The true oblation (he says) in *the Christian sacrifice* is in no sense earthy or material. It is altogether spiritual; the chief of those spiritual sacrifices in the offering whereof consists the common priesthood of us all. The eucharist comprehends them all in one; and has, besides, peculiar to itself, that which alone causes any of them to be acceptable. For the true oblation in the eucharist is not the bread and wine; that is only as the vessel which contains or the garment which veils it; but that which our Lord by the hands of the priest offers to his Father in the holy eucharist is his own body and blood, the very same which he offers and presents to him, with which, as St. Paul says, He appears before him *now*, night and day continually in Heaven, in commemoration of his having offered it once for all in his passion and death on the cross. It is the one great reality, summing up in itself all the memorial sacrifices of old. In the Christian scheme, it is "proportionable" to them; and of course it stands in the same rank and relation to them, as the other antitypes in the gospel to their several types and shadows in the law.

The memorial therefore made of Christ before the Father in holy communion is as much more real, more glorious, more blessed, than all the memorial sacrifices of old; than the yearly paschal lamb, for instance; as the one atoning sacrifice on the cross surpassed the lamb slain at the first Passover; as the descent of the Holy Spirit at Pentecost surpassed the fire on the burnt offering; as Christ is more glorious than Aaron or Melchisedec; Heaven, with the tree of life and the waters of life, more blessed than the land flowing with milk and honey; the new Jerusalem more true and real than the old; he who thinks most highly, and therefore least inadequately, of that holy and divine sacrament, cannot well say, or conceive any thing of it higher than this, that it is in the strict sense of the word, "that which the gospel hath *proportionable* to ancient sacrifices." (2)

And in his sermons preached before the University of Oxford in 1848, he says:—

And first, for doctrine. Have we not indeed, in the words of the text alone, the substance of the eucharistical office, in both its parts—both in its sacrificial and in its sacramental character? "I sanctify myself,"—there is the sacrifice, that they also may be sanctified "through the truth;" there is the sacrament. Are not these plainly the guiding, the prevailing thoughts, which He, our great teacher and examplar, would have us associate with the services of his sacred altar?

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(1) Hey's Lectures in Divinity, vol. iv. p. 349.

(2) Keble on Eucharistic Adoration, pp. 70–71.

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For thus it is:—After ordaining the eucharist for a remembrance or memorial of himself, having also by solemn prayer commended to his Father his apostles first, and in them all who should believe on him through their word, He sums up the effect of what he was doing and saying. "For their sakes I am sanctifying myself, that they also may be sanctified through the truth."

Our blessed Lord then was sanctifying himself, that is, setting himself apart, devoting or offering up himself, his own body and blood, to be the conveyance of like sanctification to us. He was making himself a sacrifice, that we being joined to him might be holy and lively sacrifices. And all this "through the truth," by participation, namely, of him who is the very truth and reality, the substance of which the old sacrifices were shadows.

I repeat it, this one saying of Christ conveys apparently in itself, the two chief points of the evangelical doctrine concerning the holy and blessed eucharist; first, that it is his memorial sacrifice; a means of obtaining God's favour and pardon for all such as truly repent; next, that it is a most high sacrament, a mean whereby we are united to Christ, and so made more and more partakers of his righteousness here, and of his glory hereafter.

When we say "memorial sacrifice" we mean that the offering in the holy communion does not only put *us* in mind of the great unspeakable things which Christ has done for us, but also that it puts God in mind of them, so the Scripture vouchsafes to speak, over and over putting into our mouth the word "remember," when we are being taught to pray. So our Lord, in the very words of consecration, "This do for the memorial of me." So the meat and bread offering mentioned so often in the Old Testament, especially in that manual for sacrifice, the book of Leviticus, is constantly said to be offered "for a memorial;" and without all controversy it was a type and shadow of that which we Christians present on our altars.

The eucharist, therefore, is a memorial or commemorative sacrifice; that is, God graciously receives what we break, pour out, and offer, as though his Son presented before him his very own body and blood. He receives it as a continuation of that first awful eucharist, according to the saying of the wise man, "I know that whatsoever God doeth, it shall be for ever." "He smelleth," as the Bible speaks, "a sweet savour," and is favourable and merciful unto us for the sake of Christ so offering himself before him. (1)

Cleaver, Bishop of St. Asaph, preached several sermons on the holy eucharist before the University of Oxford in 1787-1790. In them he dwells largely on the doctrine that the Lord's Supper was a *feast on a sacrifice*. From these I make the following extracts:—

But that I may not repeat what has been already urged upon many of these words, I will simply call to your recollection their general relation to a *sacrifice* by a bare recital of the institution, as it is given by St. Matthew, which is as follows: "And as they were eating, Jesus took bread, and *blessed* it, and brake

(1) Sermons by the Rev. John Keble, M.A. Published by Parker (1848), Oxford, pp. 259–262.

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it, and gave it to the disciples and said, Take *eat*, this is my *body;* and he took the cup, and gave it to them, saying, *drink* ye all of it; for this is my blood *of the New Testament* which is *shed* for many for the *remission of sins.*" Here, I think, I might safely rest my general argument, that easy as the connection between the parts of this proposition "Take eat, this is my body," and again of this, "Drink ye all of this, for this is my blood," may appear when unexamined, and few as the words of institution are, the real connection in the parts of the two propositions can be explained satisfactorily upon no other supposition than that of their allusion to a *sacrifice*, without which a great share of the few words in each of the passages reciting the institution will be superfluous and unintelligible, and all of them ill explained. I may, therefore, I hope, without being unduly sanguine, assert that *the idea of a sacrifice is the primary and leading idea of this institution.*

The bishop then says that it does not exactly correspond with any one species of sacrifice under the Mosaic law.

The truth is, if it be a representation or application of the sacrifice of the death of Christ, it must correspond not exactly with one but essentially with all the sacrifices of the law. "For as all the sacrifices were types of this great event, and as the event itself must correspond to its own types, so must whatever institution be made to represent that event. *The rite, therefore, which should fully shew the Lord's death, must shew the sacrifice made by that death*, which doubtless was St. Paul's meaning; a sacrifice upon which alone the merits and efficacy of that death are founded; for it is in the blood of Christ sacrificially shed that the Scriptures found the notion of propitiation, of atonement, and of forgiveness.

Ancients and moderns have considered it under distinct points of view; used distinct appellations: e.g., "*Christian sacrifice*," "Christian passover," "Christian oblation," "the eucharist," &c., the language of our Church, "a continual remembrance of the *sacrifice* of the death of Christ."

(P. 22.) I have not contended that the institution *is a material and proper sacrifice*, because the command is not, as in the vision shewn to St. Peter, "Slay and eat," but eat—"This is my body, which is broken for you;" drink, "This is my blood, which is shed for you." Thus St. Paul,—"Christ our passover is slain, therefore let us keep the feast." And again, when he compares the table of the Lord, not the altar, with the table of devils, it is evident that he considers *it as a feast upon a sacrifice*, unless we could suppose the Apostle to draw his argument from a case not parallel. There is, too, a remarkable passage in Ezekiel (xxxix. 17), the words of which on the subject are peculiarly apposite to this point, where the fowls are invited "to eat the flesh and drink the blood of the sacrifice," to which it is added, "Thus shall ye be filled at my table."

Bishop Moberly's opinion is as follows:—

Shall I ask, he says, whether the feast which they there celebrate is or is not a sacrifice? Brethren, bear with me while I venture to say that I am not very careful, so far as I can judge, to answer the question. Indeed, it appears to me to be little more than a question of words, which bears upon no important issue. The feast is what it is; and whether that is or is not what constitutes a sacrifice must depend altogether upon the precise meaning attached to the word "sacrifice,"

and the definition given to it. There surely are good and innocent senses in which it may well and rightly be so called. There surely is a sense—the highest—that in which the actual offering of the Lord's body and blood upon the altar of the Cross was once offered, the only full, perfect, and sufficient sacrifice, oblation, and satisfaction for the sins of the whole world,—in which we may not dare so to call it. (1)

I know not why we should not rest content to speak in the language of St. Chrysostom, which I have already quoted, and to call the holy feast which we celebrate our Θυσία, or Ἀναμνήσις τῆς Θυσίας, our sacrifice or recollection of the sacrifice. (2)

I will conclude with two short extracts from the treatise of the present Bishop of Ely on the Thirty-nine Articles.

Writing upon the 31st Article, he says:—

It cannot be doubted that from the very first the Fathers spoke of the eucharist under the name of an offering or sacrifice.

. . . . . .

The dread of the mass which has prevailed generally among the Reformed Churches has made the majority of their members fear to speak at all concerning an eucharistic sacrifice.

Yet there have not been wanting, in the English Church especially, men of profound learning, deep piety, and some of them by no means attached to peculiar schools of doctrine, who have advocated the propriety of speaking of the *Christian sacrifice*, and of adopting in some measure the language of the Primitive Church respecting it. (3)

The language of Mr. Bennett upon the subject of sacrifice is consistent with the doctrine of a sacrament of commemoration, and does not necessarily imply a sacrifice of propitiation; and it does not, in my opinion, necessarily or directly conflict with the articles of religion, nor with the 82nd canon, nor with the passages selected from the office of the holy communion set forth in the criminal articles; nor has it exceeded that liberty of expression which has been used by the divines whom I have cited.

Adoration of the Holy Elements.—Of Christ in the Holy Elements.

With respect to the third category, the promoter alleges that the defendant has promulgated the following doctrines:—"In or by the passage lettered H, that adoration or worship is due to the consecrated bread and wine. In or by the passages lettered N, O, and S, that adoration is due to Christ, present upon the altars or communion tables of the Church in the sacrament of the holy communion under the form of bread and wine, on the ground that

(1) Moberly's Bampton Lectures, pp. 174–5.

(2) Moberly's Bampton Lectures, p. 176.

(3) Exposition of the Thirty-nine Articles, pp. 737, 745–6.

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under their veil is the sacred body and blood of our Lord and Saviour Jesus Christ."

Mr. Bennett, in the earlier editions of his pamphlet, used these expressions:—"*Who myself* adore *and teach the people to* adore the consecrated elements, *believing Christ to be in them—believing that under their veil is the sacred body and blood of my Lord and Saviour Jesus Christ.*"

It seems to me that the first of these sentences does contravene the mind of the Church, as expressed in the declaration about kneeling, which is at the close of the order of the administration of the Lord's Supper; and though, as will be seen, these words are not without some countenance from considerable authority, they are, in my judgment, to be reprehended.

The words of the declaration are:—"Yet, lest the same kneeling should by any persons, either out of ignorance or infirmity, or out of malice or obstinacy, be misconstrued or depraved, it is hereby declared that thereby *no adoration is intended, or ought to be done, either unto the sacramental bread or wine there bodily received,* or unto any corporal presence of Christ's natural flesh and blood. For the sacramental bread and wine remain still in their very natural substances, and therefore may not be adored (for that were idolatry to be abhorred of all faithful Christians); and the natural body and blood of our Saviour Christ are in Heaven, and not here; it being against the truth of Christ's natural body to be at one time in more places than one."

Mr. Bennett has, however, been apprised of the error into which his slight acquaintance with the subject has led him, and in his latest edition this reprehensible language is withdrawn and the following language substituted for it:—"*Who myself adore and teach the people* to adore Christ present in the sacrament, under the form of bread and wine, *believing that under their veil is the sacred body and blood of my Lord and Saviour Jesus Christ.*"

I have dealt with the question as to the expression "under the form of bread and wine," and have decided that it may be lawfully used. It remains to be considered whether to profess and teach the adoration of Christ present in the sacrament is unlawful.

Such a doctrine is not at variance with the declaration of

kneeling, which discountenances the worship of the elements and of the corporal presence of Christ.

Nor is it repugnant to the 28th Article of Religion, as suggested by the promoter, for it contains no declaration against the adoration of the spiritual presence of Christ in the holy eucharist.

Entertaining this opinion, it is perhaps hardly necessary to refer to authorities in favour of the proposition, that the adoration of the spiritual presence of Christ in the eucharist may lawfully be maintained.

Some, however, I will mention.

In the dialogue between Ridley and his papal adversary are these passages:—

Glyn.—"Augustine against Faustus, 'Some there were which thought us, instead of bread and of the cup, to worship Ceres and Bacchus.' Upon this place I gather, that there was an adoration of the sacrament among the Fathers; and Erasmus, in an epistle to the brethren of Low Germany, saith, that the worshipping of the sacrament was before Augustine and Cyprian."

Ridley.—"We do handle the signs reverently: but we worship the sacrament as a sacrament, not as the thing signified by the sacrament."

Glyn.—"What is the symbol or sacrament?"

Ridley.—"Bread."

Glyn.—"Ergo, we worship bread."

Ridley.—"There is a deceit in this word 'adoramus.' We worship the symbols, when reverently we handle them. We worship Christ wheresoever we perceive his benefits; but we understand his benefits to be greatest in the sacrament."

Glyn.—"So I may fall down before the bench here, and worship Christ; and if any man ask me what I do, I may answer, I worship Christ."

Ridley.—"We adore and worship Christ in the eucharist. And if you mean the external sacrament, I say, that also is to be worshipped as a sacrament." (1)

Bishop Poynet, in his treatise on the eucharist, says:—

Here a scruple arises. If we believe the grace and virtue of the real body to be conjoined with the bread and wine, we shall seem to attribute too much to the elements, and hence a twofold evil will arise—(1) the adoration of the sacrament and the peril of idolatry, and (2) that the wicked who partake of the sacrament eat at the same time the body of Christ, and are partakers of his grace. But this latter cannot take place, for "Whoso eateth me," saith Christ, "shall live for ever," and "if any man eat of this bread he shall live for ever," which cannot be understood of the wicked.

(1) Works, p. 236.

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That is, so as to be partakers of his grace, as is more fully explained in the passage I have already given. (1)

As to the worship, I reply, that the ancients partook of the sacrament with the utmost reverence and honour, and yet were safe from idolatry. . . . . For as to their worshipping what they received, Augustine plainly testifies on the 98th Psalm, when he says, "He has given the same flesh to you to eat to salvation, but no one eats that flesh without first adoring, and not only do we not sin by adoring, but we sin by not adoring." Also, Prosper, "In the species of bread and wine which we see, we honour invisible things, that is, the flesh and blood." Also, Eusebius Emissenus, "When thou ascendest the reverend altar to be filled with spiritual food, behold, honour and wonder at the holy body of thy God." And Chrysostom (1 Cor. x. Hom. xxiv.), "I will shew you upon earth what is worthy of this highest honour. For, as palaces, not the walls, not the golden roof, but the royal body seated on the throne, is the most excellent of all; so also is the royal body in heaven now proposed to your view on earth. I do not shew you angels nor archangels, nor the heaven of heavens, but the Lord of all these." Ambrose (1 Cor. xi.), "The eucharist is spiritual medicine, which, tasted with reverence, purifies the devout receiver." And again: "The holy communion is to be approached with a devout mind, and with fear, that the mind may know that reverence is due to him whose body it approaches to receive." Theodoret (Dial. 2), "Nor after sanctification do those mystical symbols differ from their proper nature, but remain in their former substance, and figure, and appearance (species), and are therefore both seen and felt as before. But they are understood to be that which they are made, and are believed to be so, and are worshipped, as being the things which they are believed." From this and other places it is easily understood with what honour, with what reverence the ancients approached to the holy communion. Nor is this to be wondered at, when they believed that they took, in that bread, the truth, nature, and virtue, of the true body of Christ, and were far from idolatry, being diligently instructed and taught that they did not worship the outward sign, but the inward virtue, which Augustin shews by these words (De Doct. Christ., lib. iii. c. 9): "For he but subserves the sign who performs or venerates any significant thing, not knowing what it signifies; but he who performs or venerates a useful sign instituted by God, the power and signification of which he understands, does not venerate the transient thing which he sees, but rather that to which all such things are to be referred." And again, afterwards, "At this time, by the resurrection of our Lord Jesus Christ, a more manifest proof of our liberty has taken place, nor are we burdened with the heavy load of those signs which we now understand, but the Lord and apostolic discipline have handed down, in place of many, some few things, and easy to be performed, as the sacrament of baptism, and the celebration of the body and blood of the Lord, which each person when he receives, being well instructed, knows what they signify, and worships them, not with carnal servitude, but with spiritual liberty."

Thorndike says:—

I suppose that the body and blood of Christ may be adored wheresoever they

(1) See p. 240.

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are, and must be adored by a good Christian, where the custom of the church which a Christian is obliged to communicate with requires it. . . . .

But I suppose, further, that the body and blood of Christ is not adored nor to be adored by Christians, neither for itself nor for any endowment residing in it, which it may have received by being personally united with the Godhead of Christ, but only in consideration of the said Godhead, to which it remains inseparably united, wheresoever it becomes. For by that means whosoever proposeth not to himself the consideration of the body and blood of Christ as it is of itself and in itself a mere creature (which he that doth not on purpose cannot do), cannot but consider it as he believes it to be, being a Christian; and considering it as it is, honour it as it is, inseparably united to the Godhead, in which and by which it subsisteth, in which, therefore, that honour resteth, and to which it tendeth—so the Godhead of Christ is the thing that is honoured, and the reason why it is honoured, both. The body and blood of Christ, though it be necessarily honoured becomes necessarily united to that which is honoured, yet is it only the thing that is honoured, and not the reason why it is honoured, speaking of the honour proper to God alone.

I suppose, further, that it is the duty of every Christian to honour our Lord Christ as God subsisting in human flesh, whether by professing him such, or by praying to him as such, or by using any bodily gesture, which by the custom of them that frequent it may serve to signify that indeed he takes him for such, which gesture is outwardly that worship of the heart which inwardly commands it.

This honour then being the duty of an affirmative precept, which, according to the received rule, ties always (though it cannot tie a man to do the duty always, because then he should do nothing else), what remains but a just occasion to make it requisite, and presently to take hold and oblige.

And is not *the presence thereof* in the sacrament of the eucharist *a just occasion*, presently to express by the bodily act of adoration, that inward honour which we *always carry towards our Lord Christ as God?* Grant that there may be question whether it be a just occasion or not: . . . .

He goes on to say in substance, that, "supposing the custom of the Church to have determined it, it shall be so far from an act of idolatry, that it shall be the duty of a good Christian;" but that if the Church hath not determined it (though for some occasions it may become offensive and not due), "yet it can never become an act of idolatry." (1)

Dean Brevint, in his "Christian Sacrament and Sacrifice," says:—

The second is an act of adoration and reverence when he looks upon that good hand that hath consecrated for the use of the Church the memorial of these great things. I cannot, without some degree of devotion, look on any object that in anywise puts me in mind of the sufferings of my Saviour, and if I did perceive but any cloud somewhat like them, although it were but casual, I would not neglect

(1) Laws of the Church, Book III. ch. 31, sects. 1–5.

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the accident that had caused that resemblance, but since the good hand of my God hath purposely contrived it thus to set before me what I see, and since by his special appointment, these representatives are brought in hither for this church, and among all the rest for me, I must mind what Israel did when the cloud filled the tabernacle. I will not fail to worship God as soon as I perceive these sacraments and gospel clouds appearing in the sanctuary. Here I worship neither sacrament nor tabernacle, but I will observe the manner that Moses, David, and all Israel have taught me to receive poor elements with after the institution of God hath once raised them to the estate of mysteries. Neither the ark nor any clouds were ever adored in Israel; but sure it is the ark was considered quite otherwise than an ordinary chest, and the cloud than a vapour, as soon as God had hallowed them both to be the signs of his presence. Therefore, as the former people did never see the temple or cloud, but that presently at that sight they used to throw themselves on their faces, I will never behold these better and surer sacraments of the glorious mercies of God, but as soon as I see them used in the Church to that holy purpose that Christ hath consecrated them to *I will not fail both to remember my Saviour who consecrated those sacraments, and to worship also my Saviour whom those sacraments do represent.* (1)

Bishop Andrewes in his controversy with Bellarmine, setting forth the true doctrine of the Church of England, and contrasting it with that of Rome, says:—

In *adoratione sacramenti*, ad limen ipsum turpiter impingit. *Sacramenti* ait, id est *Christi Domini* in sacramento, miro, sed vero modo præsentis. Apage vero. Quis ei hoc dederit? *Sacramenti*, id est, Christi in sacramento. Imo, Christus ipse sacramenti res, in, et cum sacramento; extra, et sine sacramento, *ubi ubi est adorandus est.* Rex autem Christum in Eucharistia vere *præsentem*, vere et adorandum statuit, rem scilicet sacramenti, at non sacramentum, terrenam scilicet partem, ut Irenæus, visibilem, ut Augustinus. . . . . Nos vero et in mysteriis carnem Christi adoramus, cum Ambrosio, et non, id, sed Eum qui super altare colitur. Male enim, quid ibi colatur, quærit Cardinalis, cum quis, debuit, cum Naziansenus, Eum dicat, non id. Nec carnem manducamus, quin adoremus prius, cum Augustino, et sacramentum tamen nulli adoramus. (2)

Still more emphatic is the language of Bishop Taylor:—

Place thyself upon thy knees in the devoutest and humblest posture of worshippers, and think not much in the lowest manner to worship the King of men and angels, the Lord of heaven and earth, the great lover of souls, and the Saviour of the body, him whom all the angels of God worship, him whom thou confessest worthy of all, and whom all the world shall adore, and before whom they shall tremble at the day of judgment. *For if Christ be not there after a peculiar manner, whom or whose body do we receive? But if He be present, not in mystery only, but in blessing also, why do we not worship?* But all the Christians always did so from time immemorial. "No man eats this flesh unless he first adores," said St. Austin, "for the wise men and barbarians did worship this body in the

(1) Christian Sacrament and Sacrifice, s. II. 5, 8. Cited in the Eucharistica.

(2) Ad Card. Bellarmin, Apolog. pp. 266, 267.

manger with very much fear and reverence. Let us, therefore, who are citizens of heaven, at least not fall short of the barbarians. But thou seest him not in the manger, but on the altar. And thou beholdest him not in the Virgin's arms, but represented by the priest, and brought to thee in sacrifice by the Holy Spirit of God." So St. Chrysostom argues, and accordingly this reverence is practised by the churches of the east, and west, and south, by the Christians of India, by all the Greeks, as appears in their answer to the Cardinal of Guise, by all the Lutheran churches, by all the world, says Erasmus, only now of late some have excepted themselves. But the Church of England chooses to follow the reason and piety of the thing itself, the example of the Primitive Church, and the consenting voice of Christendom. (1)

And again:—

One thing I desire to warne you of, that is, that these phrases (scil. in the Fathers) of *Adorato Altari*, and "*προσπίπτειν τῷ θυσιαστηρίῳ*," must be understood warily, and as they were meant; not that any Divine adoration was given to the altars either relatively or transitively; but they are the metonymicall expressions of the subject for the adjunct; adoratis altaribus: that is, adorato Christo præsenti in altaribus, *inclinato capite ad altare*, that is, *inclinato capite ad Deum ibidem atque in sacris residentem*; we have good warrant to authorize this expression. (2)

I conclude my extracts from English divines with the following passage from Mr. Keble's work on Eucharistical Adoration, published in 1857:—

Thus we seem to have evidence irresistible that down to the beginning of the ninth century, i.e., through all the ages of comparatively unbroken unity in the Church, the body and blood of the Man Christ Jesus, of him who is God and Man, was adored as present after consecration in the eucharist, i.e., Christ himself was adored as present by the presence of his body and blood. Neither the depravers of the faith on the one hand, nor the maintainers of purity of worship on the other, ever seem to have found any difficulty in that point. Who can help concluding that it came down direct from the Apostles, especially considering what I will venture to call the strong presumption made out in favour of it from Holy Scripture and natural piety? It will have been seen that both St. Ambrose and St. Augustine use expressions and arguments which would be quite unwarrantable, unless they knew the practice to be a real apostolical tradition. St. Ambrose's "*hodieque*," and St. Augustine's "*Nemo manducat, nisi qui prius adoraverit*," would be neither of them honest sayings, were they not uttered under that conviction; and their arguments, grounded as they are on the two great and simple verities of the incarnation and the real presence, are of course good for all times as well as for their own. (3)

I have noticed the historical fact that Cranmer's tendencies

(1) Worthy Communicant, ch. vii. sect. 1, par. 10, vol. viii. pp. 224, 225. (Eden's Edition.)

(2) Taylor's Works, vol. v. p. 334, ed. 1859.

(3) Pages 112, 113.

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became strongly Lutheran before he died, and that the Council of Augsburg very materially influenced the language of our articles. (1) Chemnitz, a very stout Lutheran, wrote an examination of the Council of Trent, in which examination, while he strongly condemned transubstantiation, he defended the worship of our Lord in the holy elements. The passage is not unimportant; it is as follows (2):—

First, it must be shewn, what in this fifth chapter and sixth canon is the matter of controversy. For some things, I readily admit, are uncontroverted. For that Christ, God and Man, is to be adored no one but an Arian denies. And that his human nature also, on account of its union with his Godhead, is to be adored no one but a Nestorian questions. For when the Eternal Father brought the Only Begotten Son into the world He saith, Let all the angels worship him. As Matthew also plainly beareth witness (c. xxviii.) that the apostles in Galilee worshipped Christ. It is certain, moreover, that the adoration of God is not tied to place or time (John iv., 1 Tim. ii.) *Christ, then, at all times and in all places, is to be adored.* If, then, we believe that Christ, God, and Man, is, in a peculiar mode of presence and of grace, present at the celebration of his supper, so that He there, truly and substantially, exhibits to communicants his own body and blood, whereby He willeth so to unite himself with us, that to each who receives with faith, He, by this most precious pledge, applies and seals the gifts of the New Testament, which, through the giving up of his body, and the shedding of his blood, He obtained for his Church;—if, I say, we believe these things truly from our heart, it neither can nor ought to be *but that faith should venerate and adore Christ present in that action.* So Jacob (Gen. xvii.), Moses (Exod. xxxiv.) Elijah (1 Kings xix.), had no special command to worship God in those places; but since they had a general command to worship God everywhere, and were certain that God was truly *present under outward and visible symbols*, and that He was revealing himself there in a special and gracious manner, they assuredly worshipped God himself there, whom they believed to be present there. Nor would their faith have been true if invocation or adoration, i.e., the honour due to God, had not followed. (3)

I am happy to arrive at the close of the premisses from which my legal conclusion is to be drawn.

I am conscious of the great length at which these premisses

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(1) Archbishop Laurence, Bampton Lectures, Lecture I.

(2) Chemnitz or Chemnitius, born 1522, died 1586; in 1554 he wrote, among other works, "Repetitio sanæ doctrinæ de verâ præsentiâ corporis et sanguinis Domini in cœnâ sacrâ," Leipzig, 1554; and in 1585, "Examen Concilii Tridentini," Frankfort, 1585, which has been translated into English. This work had a great reputation.

(3) Cited in "The Real Presence," by the Rev. Dr. Pusey (Oxford, 1857), pp. 334–5.

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have been stated, and of the charge of prolixity to which so full a statement may expose me.

But while I have had a very arduous duty to discharge, I have not had that measure of assistance which a court of justice usually receives.

Conclusions of fact.

Mr. Bennett, who has caused all this litigation upon the subject of all others which ought not to be litigated, has not appeared before the court of his Metropolitan to justify or defend himself.

The case has been argued on one side only.

This prosecution, it has been said, is directed against Mr. Bennett alone. But I cannot shut my eyes to the fact that I am not trying Mr. Bennett alone, but also divines eminent for piety, learning, and eloquence, whose opinions Mr. Bennett has borrowed, and in some respects caricatured, but does not allow, by the course which he has taken, to be vindicated or explained.

I have, therefore, thought myself obliged, not only to investigate according to the utmost of my power all the authorities which could throw light on the subject in dispute, but to express the result of my research with a fulness of detail which, if the case had been defended, would have been unnecessary for the purposes of justice.

I have thought it right that those who have to consider my judgment should be in possession of the authorities which have influenced it.

Being compelled to speak judicially as to the law of our Church relative to this great mystery, I hope, at least, that I have said nothing respecting the supper of our Lord, which, in the words of our old divine and poet, may yet further tend to

> make this banquet prove
> A sacrament of war, and not of love. (1)

By the expressions "The real, actual, and visible presence of the Lord upon the altars of our churches," and "Who myself adore, and teach the people to adore, the consecrated elements, believing Christ to be in them,—believing that under their veil is the sacred body and blood of my Lord and Saviour Jesus Christ,"—I have no doubt that Mr. Bennett has contravened the plain meaning and clear intent of the formularies of the Church. But he has, in a

(1) Vide, ante, note to page 189.

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later edition, withdrawn these words, and substituted others for them—for "the real, actual, and visible presence of our Lord upon the altars of our churches," he substitutes "the real, actual presence of our Lord, under the form of bread and wine, upon the altars of our churches;" and for the words "Who myself adore, and teach the people to adore, the consecrated elements, believing Christ to be in them," he substitutes the words "Who myself adore, and teach the people to adore, Christ present in the elements under the form of bread and wine."

It is to be regretted that these material alterations are unaccompanied by any expressions of regret or self-reproach for the mischief which his crude and rash expressions have caused.

Mr. Bennett says:—

> My meaning, and that which passed through my mind in writing the original passages, was precisely the same as that which is now conveyed in the words substituted; but as the original words were liable to a different construction from that in which I used them, I therefore most willingly in this edition adopt another formula to express my meaning. The formula now adopted, and which, without any doubt, will convey the doctrine of the real presence, as the Church would teach it, has been suggested to me by him whose name stands at the head of this pamphlet (that is to say, the Rev. E. B. Pusey, D.D.); "one to whom the whole Church would implicitly bow and all revere. I have no hesitation in adopting his words as my own fully and completely."

I do not, however, sit here as a critic of style, or an arbiter of taste, or a censor of logic. I have not to try Mr. Bennett for careless language, for feeble reasoning, or superficial knowledge. It is my duty to decide whether the words in which he now expresses himself, and which he professes to have since borrowed from a profound theologian, occupying one of the highest positions in the University of Oxford, do or do not contravene the formularies of our faith.

If I were to pronounce that they did so, I should be passing sentence, in my opinion, upon a long roll of illustrious divines, who have adorned our universities and fought the good fight of our Church, from Ridley to Keble,—from the divine whose martyrdom the cross at Oxford commemorates, to the divine in whose honour that university has just founded her last college. Moreover, I could not pronounce such a sentence without disregarding judicial authority of the gravest kind.

For, as I have already observed, in Mr. Gorham's case the judge said:—

> The writers whom we have cited are not always consistent with themselves, nor are the reasons upon which they found their positions always valid; and other writers of great eminence, and worthy of great respect, have expressed very different opinions. But the mere fact that such opinions have been propounded and maintained by persons so eminent and so much respected, as well as by very many others, appears to us sufficiently to prove that the liberty which was left by the articles and formularies has been actually enjoyed and exercised by the members and ministers of the Church of England.

And, in Mr. Heath's case, the judge said:—

> If the doctrine in question has been held without offence by eminent divines of the Church, then, though perhaps difficult to be reconciled with the plain meaning of the Articles of Religion, still a judge in my position ought not to impute blame to those who hold it. That which has been allowed or tolerated in the Church ought not to be questioned by this Court.

In the case of "Essays and Reviews" the Privy Council held that even the words "everlasting fire" might be treated by a clergyman as not denoting the eternity of punishment, regard being had to the absence of any interpretation of the words in the formularies, to the opinion of learned men respecting the words, and to a liberty of opinion exercised on the subject by certain divines without restraint.

Now I have shewn that no mode of the presence is defined by the formularies, and by a large induction of instances that the present opinions for which Mr. Bennett is articled are not, however loosely expressed, distinguishable in substance from those which have been maintained for many years by many great divines of our Church and by many learned men.

Conclusions of law.—

The conclusions of law at which I have arrived are the following:—

With respect to the first and uncorrected edition of his pamphlet, I pronounce that Mr. Bennett, by his language respecting the visible presence of our Lord, and the adoration of the consecrated elements, has contravened the law of the Church.

If Mr. Bennett had not renounced this language, and substituted other for it, I must have considered whether I ought not to pass a sentence of suspension upon him, accompanied by a monition to abstain for the future from such language.

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The question is not now before me, whether this retractation of Mr. Bennett would have sufficed to satisfy the severe provisions of the Statute of Elizabeth (13 Eliz. c. 12), but whether this retractation, however ungraciously made, be not sufficient under the general law to indicate that he has finally abandoned the unlawful expressions which he had used.

I think, on the whole, they are sufficient for this purpose.

With respect to the second and corrected edition of his pamphlet, and the other work for which he is articled, I say that the objective, actual, and real presence, or the spiritual, real presence, a presence external to the act of the communicant, appears to me to be the doctrine which the formularies of our Church, duly considered and construed so as to be harmonious, intended to maintain. But I do not lay down this as a position of law, nor do I say that what is called the receptionist doctrine is inadmissible; nor do I pronounce on any other teaching with respect to the *mode* of presence. I mean to do no such thing by this judgment. I mean by it to pronounce only that to describe the mode of presence as objective, real, actual, and spiritual, is certainly not contrary to the law.

With respect to the other charges, namely, those relating to sacrifice and worship, I pronounce that Mr. Bennett has not exceeded the liberty which the law allows upon these subjects.

I make no order as to costs.

Proctors for the promoter: *Moore & Currey.*

July 3.

THE SAMUEL LAING.

County Court Appeal—The County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *s.* 29—*Appeal from a Decree or Order of the Court of Admiralty on Appeal from a County Court.*

As a general rule the Court of Admiralty will not grant permission to appeal from a decree or order of the Court made on appeal from a county court except in cases where the law is doubtful; or where the facts are such as to leave a substantial doubt on the mind of the Court whether the conclusion at which it has arrived is right; or where the pecuniary interest involved is large.

THIS was a cause of damage brought in the City of London Court by the owners of the schooner *Moneta* against the owners of

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the screw steamship *Samuel Laing*. The cause was tried before the judge of the City of London Court, who held that the *Samuel Laing* was alone to blame. Against this decision the owners of the *Samuel Laing* appealed to the Court of Admiralty. The appeal was heard on the 22nd of July, and the decision of the Court below was reversed. On the same day the respondent's counsel asked permission of the judge to appeal from the decree of the Court of Admiralty to the Judicial Committee of the Privy Council.

The *Admiralty Advocate*, *Dr. Deane*, *Q.C.*, and *R. E. Webster*, for the respondents, the owners of the *Moneta*.

Butt, *Q.C.*, *E. C. Clarkson*, and *Steavenson*, for the appellants, the owners of the *Samuel Laing*.

July 23. SIR ROBERT PHILLIMORE. In this case, which came before me yesterday, I was asked by the respondents to allow an appeal to the Privy Council from my judgment. I declined to do so, and on reflection I adhere to that determination; but as the appeals to this Court appear likely to increase, I have thought it expedient to state the general principles which, in my opinion, ought to govern the exercise of the discretion confided to this Court by the legislature. It appears to me, in the first place, that the legislature intended the granting of an appeal to be the exception not the rule. The object of the County Court Admiralty Jurisdiction Acts, 31 & 32 Vict. c. 71, and 32 & 33 Vict. c. 51, and similar statutes, is to prevent long and costly litigation upon questions where the pecuniary interest at stake is small. They carry the principle of interest reipublicæ ut sit finis litium to a considerable extent. The statute which I am now considering, by confining the appeal ex debito justitiæ to one court, and giving the judge of that court a discretion as to allowing a further appeal, contemplated that he would keep this principle in view. I have considered the class of exceptional cases as to which I ought to exercise this discretion in favour of a further appeal, and without binding myself to an invincible adherence to the opinion which I am about to express, I think that in the following cases only I ought to allow an appeal:—where the law is doubtful or novel in its application; where the facts are such as to leave a substantial

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doubt upon the mind of the Court whether the conclusion at which it has arrived be right; and where the pecuniary interest—a case which may happen under the provisions of the act in question—is large. In all other cases I think that, in accordance with the principle on which the County Court Jurisdiction Acts are founded and with the presumable intention of the Legislature, I ought not to allow a further appeal.

Solicitors for the owners of the *Samuel Laing*: *Hillyer & Fenwick.*

Solicitor for the owners of the *Moneta*: *Cooper.*

May 10.

THE ANDRINA.

Salvage—Derelict—Apportionment.

5 P D 190

A steamer laden with a valuable cargo, and having passengers on board, fell in with a derelict brig in the Bristol Channel, and with great difficulty, in spite of a strong wind and heavy sea, succeeded in towing her into port. The value of the brig, together with her cargo and freight, amounted to nearly 2800*l.* The Court awarded 900*l.* to the salvors.

THIS was a cause of salvage instituted on behalf of the owners, master and crew of the steam-vessel *Athlete* against the brig *Andrina*, her cargo and freight.

The following are the principal facts which were stated in the petition.

The *Athlete* is an iron screw steamer of 356 tons register, with a crew of seventeen hands all told. She has engines of 90-horse-power nominal, working up to 363-horse-power, and is of the value of 8000*l.* or thereabouts. On the 6th day of January, 1870, the *Athlete* left Liverpool, on a voyage to Bristol, with a valuable cargo, and three passengers on board. At about 9.15 on the evening of the 9th, the *Athlete* was off Shokham Island. The wind was blowing very strong from the northward, with a high sea. The night was clear and moonlight, and the mate of the *Athlete* reported what appeared to be a vessel apparently unmanageable about half a mile distant on the starboard bow. The

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course of the *Athlete* was altered so as to bring her under the lee of the vessel which was lying in the trough of the sea. She was rolling heavily with the sea breaking over her. The quarter-boat of the *Athlete* was lowered, and the mate and four men who volunteered for the service proceeded to the vessel. The mate and two men with great difficulty succeeded in getting on board. They found that she was the Austrian brig *Andrina*, totally abandoned. She had a strong list to port, and was much down by the head. The sea was breaking constantly over her, making it difficult and dangerous to do anything on board. The moon at this time had set, and it was quite dark. By means of the boat and the two men left in it a line was taken from the *Athlete* to the *Andrina*, and a six-inch hawser was thus passed from the *Athlete* to the *Andrina*, and made fast. The boat was then hoisted up, and the *Athlete* began to tow slowly. After towing for a quarter of an hour the hawser parted, owing to the heavy sea. Those on board the *Andrina* set her foresail and jib, and kept her before the wind, whilst the crew of the *Athlete* hauled in the broken hawser, and again lowered a boat for the purpose of sending another line to the *Andrina*. With much difficulty, and after several failures (having at one time been obliged to let go the hawser as the two vessels were nearly fouling each other), they succeeded in getting another six-inch hawser and afterwards a new five-inch hawser on board the *Andrina*, both of which were made fast. The *Athlete* then proceeded to Milford with the *Andrina* in tow, and the latter vessel was brought to anchor in Milford Haven at about 4 A.M. on the 10th of January. If the *Andrina* had not been taken in tow by the *Athlete*, she would have gone ashore in the course of the night upon the rocks, or otherwise would have been totally lost. The men who went to the *Andrina* in the boat were in great danger of their lives, the sea running very high on both the occasions on which the said boat was lowered. The *Athlete* herself also ran great risk of injury by collision with the *Andrina*, and incurred the risk also of her propeller being fouled by the towing hawsers, in which event she would have been in great peril. The owners of the *Athlete* employed men to pump out the water from the *Andrina*, and incurred expenses amounting to 93*l.* or thereabouts in taking care of the

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vessel, trimming and securing cargo, and in temporary repairs, and they estimate the damage to the hawsers at about 30*l.*

The owners of the *Andrina*, and the owners of the cargo laden on board her, submitted to the judgment of the Court upon the facts stated in the petition. It was agreed that the value of the *Andrina* was 825*l.*, the value of her cargo 1450*l.*, and the value of her nett freight 500*l.*

Butt, Q.C., and *W. C. Gully*, for the owners, master, mate, and the bulk of the crew of the *Athlete*.

Inderwick, for others of the crew of the *Athlete*.

E. C. Clarkson, for the owners of the *Andrina*.

Lodge, for the owners of the cargo of the *Andrina*.

SIR ROBERT PHILLIMORE. There can be no doubt that an important salvage service has been rendered in this case; it is owing to the exertions of the salvors that the property has been saved from total loss. It is admitted in the case that the men who went in the boat to the *Andrina* were in danger of their lives; but at the same time I must bring my experience to bear upon the statements in the case, and I am satisfied that the danger incurred by them cannot have been extreme. I award the sum of 900*l.* to the salvors; and, as I have been asked to apportion this sum, I direct it to be apportioned as follows. I award 450*l.* to the owners of the *Athlete;* this sum I intend to cover the expenses and damage they have sustained. I award 100*l.* to the master of the *Athlete*, and 200*l.* to the boat's crew, the amount to be distributed amongst them according to their rating, and 150*l.* to the rest of the crew of the *Athlete*, the amount to be distributed amongst them in like manner. I see no reason why more than one set of costs should be allowed to the plaintiffs.

Proctors for the owners, master, mate, and some of the crew of the *Athlete: Pritchard & Sons.*

Solicitor for others of the crew of the *Athlete: Eaden.*

Solicitors for the owners of the *Andrina: Fielder & Sumner.*

Solicitors for the owners of cargo: *Waltons, Bubb, & Walton.*

THE EXPLORER.

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Jurisdiction—Lord Campbell's Act (9 & 10 *Vict. c.* 93)—*Damages for the Death of an Alien caused by wrongful act, neglect, or default on the high Seas.*

In a damage suit instituted against the vessel A., it was alleged in the petition that the A. ran into the vessel B. at sea, and caused her to founder, whereby some of the crew of the B. and a passenger on board her were drowned, and that the collision was caused by the improper navigation of the A. The legal personal representatives of the deceased persons were plaintiffs in the suit.

The owners of the A. in their answer pleaded, as to the claim made on behalf of the legal personal representatives of the deceased persons, that the collision took place on the high seas, that the deceased persons were aliens, and the B. a French vessel.

On motion the Court ordered the paragraphs of the answer containing these allegations to be struck out as irrelevant.

The provisions of Lord Campbell's Act extend to a case where the person in respect of whose death damages are sought to be recovered was an alien, and was at the time of the wrongful act, neglect, or default which caused his death on board a foreign vessel on the high seas.

THIS was a suit instituted on behalf of the owners of the late ship or vessel *Bretagne*, the owners of the cargo laden therein, the survivors of the crew of the said ship proceeding for their private effects on board thereof, and the legal personal representatives of the master and remainder of the crew, and of a passenger on board the said ship, against the ship *Explorer*, and against the owners thereof intervening.

The petition alleged in substance that the *Explorer* ran into the *Bretagne* at sea, and caused her to founder, whereby her master and mate and three seamen and a passenger on board her were drowned; and that the collision was occasioned by the improper navigation of the *Explorer*. By the prayer of the petition the plaintiffs prayed the judge to pronounce for the damage proceeded for, and to condemn the defendants and their bail therein, and in costs, and otherwise that right and justice might be administered in the premises.

The 9th article of the defendants' answer contained inter alia the following paragraphs.

9. As to the claim or claims made on behalf of the legal personal representatives of the master, and remainder of the

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crew, and of a passenger on board the said ship, the defendants say:—

(*b*). The collision took place on the high seas, and not within the limits or jurisdiction of Great Britain and Ireland, and the master, remainder of the crew, and passenger aforesaid were aliens, and not British subjects, and the *Bretagne* was a French, and not a British, ship.

(*d.*) This Court has no jurisdiction over the said claim. The right of action did not exist in this or any court before the statute 9 & 10 Vict. c. 93 (Lord Campbell's Act), and the only jurisdiction this Court has is conferred upon it by that statute, and subsequent statutes applying to this Court, and the provisions of that statute are such as exclusively apply to the common law courts, and cannot be observed in this court.

Nov. 3. *Butt, Q.C.*, and *W. G. F. Phillimore,* on behalf of the plaintiffs, moved to reject the paragraphs of the answer above set out. They cited *The Amalia* (1); *The Guldfaxe.* (2) The *Guldfaxe* was a foreign vessel, although that fact is not stated in the report of the case.

R. G. Williams, contrà. The case of *The Guldfaxe* (2) is a direct authority in favour of the proposition that this Court has jurisdiction to entertain a suit instituted under the provisions of Lord Campbell's Act, and it is useless to ask the Court to overrule that case. But it does not appear from the report of the case, that the question whether the provisions of Lord Campbell's Act conferred a right of action in respect of the death of foreigners caused upon the high seas was considered or decided. It is submitted that the provisions of Lord Campbell's Act do not confer any right of action in such case: *The Halley* (3); *Scott* v. *Lord Seymour* (4); *Mostyn* v. *Fabrigas* (5); *The Amalia* (1); *The Saxonia* (6): *Cope* v.

(1) Br. & L. 151; 32 L. J. (P. M. & A.) 191.

(2) Law Rep. 2 A. & E. 325. The *Guldfaxe* was a Norwegian ship. In that case the collision occurred in the English Channel, twelve miles off Brighton; the deceased persons were British subjects, and formed part of the crew of a Shoreham fishing lugger.

(3) Law Rep. 2 P. C. 193.

(4) 1 H. & C. 219; 31 L. J. (Ex.) 457; 32 L. J. (Ex.) 61.

(5) 1 Sm. L. C. 6th ed. 623.

(6) Lush. 410; 31 L. J. (P. M. & A.) 201.

Doherty (1); *The Zollverein* (2); Story's Conflict of Laws, c. 8, s. 373 (g); c. 9, s. 423 (h).

Butt, in reply.

Cur. adv. vult.

Nov. 22. SIR ROBERT PHILLIMORE. During the argument of this case I stated that the question of jurisdiction appeared to me to be substantially the same as the question decided in the case of *The Guldfaxe.* (3) But I thought it due to Mr. Williams, after the argument addressed by him to the Court, to take time to consider my judgment. Upon reflection I see no reason to depart from the principles I laid down in the case of *The Guldfaxe.* (3) In that case the suit was brought against a foreign ship by the personal representatives of a person killed in a collision, to recover compensation for the injury resulting from the death of the deceased. There the whole question of jurisdiction was carefully considered, and I arrived at the conclusion that this Court had jurisdiction to entertain the suit. The only distinction between that case and the present is, that in that case the defendants were foreigners, in the present case the persons in respect of whose death damages are sought to be recovered were foreigners. I order the paragraphs (*b*) and (*d*) in Article 9 to be struck out; but I will, if the defendants wish it, give them leave to appeal.

Proctors for plaintiffs: *Dyke & Stokes.*

Solicitors for defendants: *Neal & Philpot.*

(1) 4 K. & J. at p. 381; 27 L. J. (Ch.) 600.

(2) Swab. 96.

(3) Law Rep. 2 A. & E. 325.

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Salvage—Towage—Circumstances under which a Towage Contract may be superseded by the right to Salvage.

A steam-tug entered into a contract to tow a ship at sea into the port of Liverpool for 45*l.* During the performance of the service a hurricane arose and the vessels were in serious danger. The tug, at great peril to herself, continued to tow the ship during the hurricane, and by so doing prevented the ship drifting upon a lee-shore. The wind soon afterwards moderated, and the tug, still continuing to tow the ship, brought her into the port of Liverpool in safety :—

Held, that the tug was entitled to salvage reward.

The criterion by which it is to be ascertained whether a vessel under contract to tow has become a salvor is, whether supervening circumstances have occurred such as to justify her in abandoning the contract of towage; and in order to justify her in abandoning the contract of towage, there must be among the supervening circumstances an element of serious danger, which was not in the contemplation of the parties at the time they entered into the contract.

A tug under contract to tow a ship into port may be entitled to salvage reward for bringing the ship into port, although nothing has occurred to occasion an actual interruption to the towage.

This was a cause of salvage instituted on behalf of the owners, master, and crew of the steam-tug *Retriever* against the ship *I. C. Potter* and her cargo and the freight due for the transportation thereof, and against the owners of the said ship intervening.

The facts stated in the petition were substantially as follows :—

First. The *Retriever* is a steam-tug belonging to the port of Liverpool, of the value of 11,000*l.*, with engines of 140 nominal and 650 actual horse-power. The *I. C. Potter* is a ship of 1,244 tons burden, and had on board at the time hereinafter referred to a valuable cargo of rice, shipped at Rangoon.

Second. On the morning of Tuesday, the 11th of October, 1870, the weather being fine and the wind moderate, the steam-tug was off the Smalls, proceeding with a full crew of twelve hands, all told, on her way from Newport to Liverpool, when she fell in with the ship *I. C. Potter*, then bound for Liverpool. An agreement was made that the *Retriever* should tow the *I. C. Potter* to Liverpool for 45*l.* The tug was accordingly made fast to the ship and began to tow at about 11 A.M.

Third. At six o'clock in the morning of the 12th of October the tug having the ship in tow had arrived off the Middle Mouse,

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between the Skerries and Point Lynas, and was about half a mile from the shore. About this time a heavy gale from the S. S. E. suddenly sprung up, and a signal for a pilot was made to a pilot-boat that was near, but the boat was prevented, by the state of the wind and sea, from attempting to put a pilot on board the *I. C. Potter.*

Fourth. The gale continued to increase in strength, getting round to the west of south, and by 11 A.M. was blowing with extraordinary violence. The steam was kept at the highest possible pressure, the *Retriever* vainly endeavouring to keep the ship's head to the wind. It was, however, impossible to get the head of either vessel nearer than two-and-a-half points off the wind, which drove them rapidly in a northerly and easterly direction, the wind going round to the S. W. Very heavy seas struck the rudder, knocking down the men at the wheel and rendering it difficult to steer.

Fifth. At 5 P.M. the tug and ship were drifting near and towards the West Hoyle Bank, the wind blowing with unabated violence. The master of the *Retriever* wrote on a black board "What are you going to do?" and held it up towards the ship. The master of the ship made answer by the same means—"I do not know;" the master of the *Retriever* then made signal—"Hoist all possible sail." The signal flags were all blown away before they could be got down. An attempt was then made to set the foretop-mast stay-sail of the ship, but it was blown to ribands immediately.

Sixth. About 10 P.M., the wind having veered to the west, both vessels had drifted very close to the West Hoyle Bank, the lead giving only ten fathoms. The ship shewed a blue light, and the tug wore the ship round, heading about N.W. Both tug and ship continued to drift to leeward along the edge of the bank.

Seventh. At midnight, the wind blowing a hurricane, the crew of the *Retriever* came to the master on the bridge and begged him to cast off the ship, as the only means of saving the tug and the lives of those on board of her. The master refused to cast off the ship, telling the crew, as the fact was, that if he did so the ship would be lost within an hour with every soul on board. The state of the weather rendered it impossible for the tug to take the crew from off the ship, and the situation of both vessels was one of imminent danger.

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Eighth. The crew, with the exception of the fireman, remained on the bridge for three hours, the seas washing over every other part of the tug and carrying away her bulwarks and the outsides of her paddleboxes, and straining her stanchions and the stays of her boilers. The bottoms of the bunkers were washed up, and the water was up to the waists of the firemen.

Ninth. At 3 A.M. the tug and ship were off Lytham, and at about 4 A.M. the wind shifted to the N.W., and began to moderate, so as to render it possible to tow the ship to windward. At 9.30 A.M. on the 13th the *Retriever* towed the ship across the bar of the Queen's Channel. No pilot-boat was in sight, and at the request of the master of the ship the master of the *Retriever* consented to pilot the vessel across the bar and up the Channel. At 11 A.M. the tug rounded-to off the St. George's landing-stage, and a pilot came on board. The tug then towed the ship to abreast of the Stanley Dock, where the ship came to anchor, and remained with her till 11 P.M., when she took her safely into the Stanley Dock.

Tenth. The *Retriever* towed the *I. C. Potter* with a new Manilla 12-inch hawser, belonging to the latter vessel, but great skill and incessant attention was necessary in the management of the hawser and of the engines by those on board the tug, in order to prevent the hawser from parting.

Eleventh. Had the *Retriever* cast off the *I. C. Potter*, she could at any time have placed herself in a position comparatively free from danger, but by keeping fast to the ship, and performing the services above described, she and her crew incurred extraordinary risk, and preserved the *I. C. Potter* and all on board of her from certain destruction.

Twelfth. The repairs done to the *Retriever* consequent on her exposure to the gale, under the circumstances above mentioned, cost 144*l.*, and occupied a fortnight, during which time the tug lost very profitable employment.

The defendants, by their answer, denied many of the statements in the petition, and made the following averments:—

Fourteenth. At 8 A.M. of the 13th, there being no pilot-boat in sight, the master of the ship signalled whether the tug could take her to Liverpool without a pilot. The master of the tug signalled in the affirmative, and proceeded to do so.

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Fifteenth. At 10.30 A.M. the tug, with the ship in tow, passed the Bell Buoy, and at 1.30 P.M. arrived off the Stanley Dock, where the ship was docked the same evening.

Sixteenth. It is not true that the tug or those on board incurred any extraordinary danger during the performance of the said services, or that the ship would have been placed in imminent danger had the tug cast off from her.

Seventeenth. The defendants submit that save in taking the vessel into the Mersey without a pilot, the *Retriever* performed no services beyond the scope of those contemplated at the time when the agreement was entered into.

Eighteenth. The defendants, before suit, tendered to the plaintiffs the sum of 45*l.*, due to them under the terms of the said agreement, but the said tender was refused by the plaintiffs, and the defendants now bring the like sum into court.

Nineteenth. The defendants further bring into court the sum of 12*l.*, in respect of the pilotage services rendered by the *Retriever*, as set forth in the 14th and 15th articles.

The defendants, by their answer, prayed the judge to pronounce in favour of the agreement, and of the tender of 45*l.*, and further to pronounce that the sum of 12*l.* was a sufficient remuneration for the pilotage services rendered by the *Retriever*, and to dismiss the defendants from all further observance of justice in the suit, and to make such order as to the costs of the same as to him should seem meet.

Nov. 19. The case came on for hearing. The facts proved by the evidence, which were substantially the same as the facts alleged in the petition, appear from the judgment.

Pickering, Q.C., and *W. C. Gully*, for the plaintiffs, contended that the *Retriever* incurred risks and performed duties which were not within the scope of the agreement, and that the plaintiffs were entitled to claim as salvors: *The Minnehaha.* (1)

Butt, Q.C., and *E. C. Clarkson*, for the defendants. The principle laid down in *The Minnehaha* (1) applies only to cases where the ship salved is exposed to dangers which require from the tug

(1) Lush. 335; 30 L. J. (P. M. & A.) 211.

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services of a *different class* from the services stipulated for by the agreement. In the present case the towage was not interrupted, and no services of a different class were rendered. *The Pericles* (1), *The White Star* (2), and *The Galatea* (3) are all cases in which the towage was interrupted, or in which the services rendered were entirely out of the scope of the agreement to tow.

Pickering, Q.C., in reply.

Cur. adv. vult.

Nov. 22. SIR ROBERT PHILLIMORE. This is a cause of salvage of which the circumstances are peculiar. On the morning of Tuesday, the 11th of October last, the *Retriever*, a steam-tug of Liverpool, made an agreement with a large ship called the *I. C. Potter* to take her to Liverpool for 45*l.* The ship at the time was off the "Smalls Light" on the coast of Pembrokeshire.

She was of 1244 tons burden, and had on board a valuable cargo of rice shipped at Rangoon. The *Retriever* had engines which worked up to between 650 and 700 horse-power, and is admitted to be the finest boat of her kind in the port of Liverpool. The towing hawser was a new Manilla of twelve inches. The weather at the time when the towage service began, about 11 A.M., was fine, and the wind about S.S.W. The weather continued fine till 6·30 next morning, when the vessels arrived off the Middle Mouse, between the Skerries and Point Lynas, off the Isle of Anglesea. A very heavy squall set in from the S.S.E. When they were about four miles from Point Lynas and half a mile from the shore, and had a flag hoisted for a pilot, the wind increased and got round to the W., and from this time the danger to the ship and tug began. The ship had no sail, and was under bare poles, unable to steer, and trying to keep her head to the wind. The gale increased in violence, and the vessels drifted fifteen miles to the north in the direction of Hoyle Bank. At five in the evening the master of the tug hoisted a black board, on which was written, "What are you going to do?" The master of the ship made answer in the same way, "I do not know." The master of the tug then said, "Hoist all possible sail." The ship then tried to set her foretop-mast staysail, but it was blown to pieces immediately.

(1) Bro. & Lush. 80. (2) Law Rep. 1 A. & E. 68. (3) Sw. 349.

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At 9.30 the lead was hove, and they were in ten-fathom water. The wind was from W.S.W. The ship burnt three lights, and fired pistol-shots as signals to wear her round, and the tug wore her round to the W.N.W.

From eleven till two o'clock the gale increased to a hurricane, and it is during this interval of time that it is proved that both ships were in a state of great peril, as indeed it hardly required the authority of the Trinity Masters to assure me that they must have been, regard being had to the violence of the tempest, and the character of the shore which was close under their lee. At this time four pumps were at work on board the tug; the bunkers were full of water; and the pressure of the engines was five pounds above the weight which she could safely bear. The engineer sent by the fireman a pressing message to state these facts, and urge that the hawser should be let go. The Trinity Masters have no doubt that had this course been taken the ship would have driven upon the bank, and probably perished with all on board. They are also of opinion, and I entirely agree with them, that the conduct of the master of the tug in this emergency was distinguished by great courage and skill, and deserved great praise. He determined to hold on and see if the weather would moderate, which it did after two o'clock, and by this determination the vessel was saved. She was towed safely into the Mersey, and came to anchor abreast of Stanley Dock about eleven o'clock of the morning of the 13th. The repairs to the tug occasioned by her exertions on this occasion amounted to 144*l*.

Representing these facts and circumstances, the tug claims in this court remuneration on the principle of salvage. The ship opposes her claim, and tenders the amount of the sum contracted for in the towage agreement, and a small additional sum for pilotage.

I should also state that it does not appear, from the evidence, that the tug was driven by the weather any considerable distance out of her towage course, but that the duration of the service was about double that which in ordinary weather it would have been.

To these facts I have now to apply the law. It is not disputed that circumstances may supervene which engraft upon an original

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towage agreement the character of a salvage service; and to this proposition of law I must add another, which has an important bearing on my decision, namely, that when the supervening circumstances, from stress of weather or otherwise, are such as to justify the towing vessel in abandoning her contract, it is still her duty to remain by the towed vessel for the purpose of rendering her assistance, but that for such assistance she is entitled to salvage reward. In *The Minnehaha* (1) their Lordships, the Judicial Committee of the Privy Council, referring to these propositions of law, said: "The rule, as it is established, guards against both inconveniences, and provides at the same time for the safety of the ship and the just remuneration of the tug." I may add that it has also been ruled by this Court, in *The Pericles* (2), that a tug under a contract to tow may, in some circumstances, earn salvage reward, though she herself has incurred no risk in the performance of the service. In the present case, however, the tug did unquestionably incur risk in continuing to tow. On the other hand the law is clear, that a contract once entered into cannot be broken merely because a change of weather or other supervening circumstances have rendered the execution of it more onerous than was anticipated: *The True Blue* (3). In my judgment, there must be among the supervening circumstances an element of serious danger, not in contemplation of the parties to the contract, in order to justify the abandonment of that contract and to found a salvage service: *The Galatea* (4): *The White Star.* (5)

The counsel for the ship have contended that the principle underlying all the cases in which salvage services have been engrafted upon a towing engagement has been that the new service was of a different class and the original service interrupted; and it is urged that in this case the service was not of a different class, but remained towage, and was not interrupted, as by the breaking of a hawser or other circumstances. But I cannot assent to this opinion. I think the true criterion by which it is to be ascertained, whether the towing vessel has become a salvor, is whether the supervening circumstances were such as to justify her in abandoning

(1) Lush, 335, 348; 30 L. J. (P. M. & A.) 211, 213.
(2) Bro. & Lush. 80.
(3) 2 W. Rob. at p. 180.
(4) Sw. 349.
(5) Law Rep. 1 A. & E. 68.

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her contract. I apply this criterion to the present case; and I am clearly of opinion that during the interval of time mentioned, when the hurricane was blowing these vessels upon the lee-shore, and the tug was in the state which I have described, she would have been justified in following the advice of the engineer, and letting go her hawser, that is, in abandoning her contract. The continuance of the towage, therefore, in these circumstances, which placed both life and property in danger, became, in my judgment, a salvage service.

I have now to settle the amount to be awarded; and in doing so I mean to bear in mind the fact of the original contract, and the shortness of the interval during which the towage service was, so to speak, in abeyance, and the salvage service was being performed—that is, from 11 P.M. of the 12th to 2 A.M. of the 13th. I take the value of ship, freight and cargo to be between 19,000*l.* and 20,000*l.*; and the damage to the tug, in the performance of the service, to be about 144*l.* I award 500*l.*, with the usual costs.

Proctors for plaintiffs: *W. G. Jennings.*
Proctors for defendants: *Pritchard & Sons.*

THE FOREST QUEEN.

Nov. 29

Appeal from County Court—Security for Costs—The County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *ss.* 26 *and* 27.

Before an appeal is made to the Court of Admiralty from a decree or order of a county court in an Admiralty cause, security for costs must be given. Such security must be given in the county court before lodging the instrument of appeal in the registry of the Court of Admiralty.

5 PD. 147-8

THIS was a cause of appeal from the county court of Yorkshire. The owners of the *Forest Queen*, the respondents in the cause of appeal, appeared under protest, pleading a petition on protest, which was in substance as follows:—

1. On the 14th of May, 1870, an Admiralty suit for damage by collision was instituted in the county court of Yorkshire, holden at Kingston-upon-Hull, on behalf of Abraham Adderson (the plaintiff

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THE FOREST QUEEN.

in this cause of appeal), against the owner or owners unknown of the steamship *Forest Queen*, and the defendants under protest duly appeared as defendants in the said suit.

2. On the 22nd of July, 1870, the said suit having been heard, it was decreed by the said county court that the said Abraham Adderson should recover against the defendants in the said suit the sum of £102 10*s.* 10*d.*; and it was ordered that the said defendants should pay the same to the registrar of the said court within fourteen days.

3. On the 25th of July, 1870, the proctors for the said Abraham Adderson instituted in this honourable court by præcipe filed therein a cause of appeal from the said decree of the said county court of Yorkshire made in the said suit against the owners of the *Forest Queen*, being the defendants under protest.

4. On the 25th of July, 1870, a notice that the said appeal had been entered in this honourable court was filed in this honourable court, and a copy thereof served on the solicitors for the defendants.

5. At the time of the instituting the said cause of appeal in this honourable court, and at the time of filing the said notice thereof and at the time of making the said appeal from the said final decree of the said county court of Yorkshire, no security for costs had first been given by or on behalf of the said plaintiff either in the said county court or in this honourable court in conformity with the provisions of the statute made in that behalf, nor was such security given within ten days from the date of the said decree appealed from.

The proctor for the petitioner prayed the judge to declare that the Court could not entertain the said appeal, and that the plaintiff was not entitled to prosecute the same, and to condemn the plaintiff in the costs of the proceedings.

The answer filed on behalf of the said Abraham Adderson, the appellant, was substantially as follows:—

1. After the præcipe to institute this cause of appeal was filed, and notice thereof was served on the respondents as in the said petition stated, negociations were entered into between the respondents by their proctor and the appellant by his proctors as to the amount in which security for the costs of this appeal should be

given by the appellant, and it was ultimately agreed between the said proctors respectively acting as aforesaid, that such amount should be the sum of 200*l.*, and accordingly the appellant on the 15th of August last filed a proper bail bond giving security for such costs in such amount.

2. After such bail bond had been so filed, and not before, the respondents appeared under protest to the jurisdiction of this honourable Court, such appearance being the first intimation given to the appellant that the respondents objected to the jurisdiction of this Court.

3. No security for the costs of this appeal could have been given in this honourable court until after the filing of the said præcipe to institute this cause of appeal.

4. The appellant submits that security for costs was duly given in conformity with the provisions of the statute made in that behalf, and if not then, that the respondents, by reason of the matters hereinbefore stated, waived any objection to the prosecution of this appeal which they might otherwise have taken.

Gibson, for the respondents, argued in support of the petition on protest. The question turns upon the meaning of the 26th and 27th sections of the County Courts Admiralty Jurisdiction Act, 1868. The 26th section provides, in effect, that an appeal may be made on security for costs being first given. The giving of security for costs is a condition precedent to the institution of the appeal. Unless security for costs is first given, all the proceedings are invalid: *Stone* v. *Dean* (1); *Morgan* v. *Edwards.* (2) Further, the security for costs must be given, not in this court, but in the court below. The 26th section provides that the appeal shall be subject to such other provisions as general orders shall direct. The general orders made for regulating the practice and procedure of the Admiralty jurisdiction of the county courts contain no express provision upon the subject, but the 77th of these orders provides "that the rules, orders, practice, and forms in actions in the county courts shall, subject to these orders, be adopted with reference to Admiralty suits, so far as they shall be respectively applicable." According to the County Court Common

(1) E. B. & E. 504; 27 L. J. (Q.B.) 319.

(2) 29 L. J. (M.C.) 108.

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Law Rules, 1867, Rules 186–191, in case of appeal security must be given in the county court.

E. C. Clarkson, contrà. It has been the practice in these cases to give security in this court, and not in the court below.

SIR ROBERT PHILLIMORE. The 26th and 27th sections of the County Courts Admiralty Jurisdiction Act, 1868, provide that the appeal is to be made by lodging an instrument of appeal in the registry of this court, and that security for costs must be given before the appeal is made. When it is considered what great inconvenience would arise if an attempt were made to give security in this court in a cause of appeal before any cause of appeal had been instituted, I think it is reasonable to conclude that the legislature intended security for costs to be given in the county court. There is nothing anomalous in such a practice; a similar practice prevails in cases where an appeal is made from this court to the Judicial Committee of the Privy Council, and in cases where an appeal is made from a county court to the Superior Courts of Common Law. I must pronounce in favour of this protest, but considering the circumstances of this case, and that some uncertainty has hitherto existed as to the practice of the Court, I think I ought to give no costs.

Proctor for respondents: *H. C. Coote.*

Proctors for appellants: *Clarkson, Son, & Greenwell.*

THE INDUSTRIE.

1871
Jan. 17.

Damage—Jurisdiction—3 & 4 *Vict. c.* 65, *s.* 6—*The Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *s.* 7.

The petition in a damage suit alleged that the plaintiffs' vessel, in the early morning when it was dark, was proceeding under sail in the channel leading to the harbour at H., when the vessel *I.*, which had not any light exhibited, was made out ahead; the helm of the plaintiffs' vessel was then ported, but as soon as this had been done it was discovered that the *I.* was across the channel, and that the plaintiffs' vessel was in imminent danger of running into her; the helm of the plaintiffs' vessel was put hard aport to avoid running into the *I.*, and thereby the plaintiffs' vessel was compelled to go out of the fair-way of the channel, and in consequence thereof she took the ground and drove against the town wall of H. and sustained damage, and also did damage to the wall; that the damage to the plaintiffs' ship, and the losses of the plaintiffs by reason thereof, were occasioned by negligence of those on board or in charge of the *I.* in having got the *I.* across the fair-way, and in leaving her there without any light exhibited or other measures taken to warn other vessels of her position; that the measures taken by the plaintiffs' vessel to avoid coming into collision with the *I.* were proper and necessary for that purpose; and after taking such measures those on board the plaintiffs' vessel were unable to prevent their vessel taking the ground and suffering the damage aforesaid:—

Held, that the petition disclosed a good cause of action, and that the Court had jurisdiction to entertain the action.

THIS was a cause of damage instituted on behalf of the owners of the brig *Blue Bell* against the vessel *Industrie*. The following are the material allegations contained in the petition:—

1. On the 11th of October, 1870, the brig *Blue Bell*, of the burthen of 191 tons register or thereabouts, navigated by Benjamin Dickenson and a crew of six hands, sailed from Shoreham in ballast, bound to Hartlepool.

2. Shortly after 5 A.M. of the 16th of the said month the *Blue Bell*, in the prosecution of her voyage, was in the channel leading to the harbour at Hartlepool proceeding under close-reefed foretop-sail and foretop-mast stay-sail only, steering N.W. and by N. ½ N., and making about seven or eight knots an hour, with the Admiralty regulation lamps, to wit, a green lamp on the starboard side and a red lamp on the port side, duly exhibited and burning brightly, and a good look-out was being kept from on board her.

3. The morning at this time was dark, the tide was flood and of

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the force of about one knot an hour, and the wind was a gale from S.S.W.

4. Whilst the *Blue Bell* was proceeding under the circumstances aforesaid, the lights of two steam tugs were seen ahead towards the W. side of the channel. The *Blue Bell* approached to pass astern of the two steam tugs, there being room sufficient for her to do so, but whilst so doing, a vessel which proved to be the *Industrie,* the vessel proceeded against in this cause, and which had not any light exhibited, was made out ahead at the distance of about fifty yards from the *Blue Bell.* The helm of the *Blue Bell* was then ported, but as soon as this had been done it was discovered that the *Industrie* was across the channel, and that the *Blue Bell* was in imminent danger of running into the side of the *Industrie* and doing that vessel and herself considerable injury. The helm of the *Blue Bell* was put hard aport to avoid running against the *Industrie,* and thereby the *Blue Bell* succeeded in avoiding the *Industrie,* but in so doing the *Blue Bell* was compelled to go out of the fair-way of the channel, and in consequence thereof she took the ground close under the bows of the *Industrie;* and although the anchor of the *Blue Bell* was immediately let go and her topsail furled, she dragged her anchor and drove against the Hartlepool town wall, and thereby sustained serious damage, and also did damage to the said wall.

5. The said damage to the *Blue Bell,* and the losses of the plaintiffs by reason thereof, were occasioned by the negligence of those on board or in charge of the *Industrie,* in having got that vessel across the fair-way, and in leaving her there without any light exhibited, or other measures taken to warn other vessels of her position.

6. The measures taken by the *Blue Bell* to avoid coming into collision with the *Industrie* were proper, and were necessary for that purpose, and after taking such measures, those on board the *Blue Bell* were unable to prevent the *Blue Bell* from taking the ground and striking the said wall, and suffering the damage aforesaid.

7. The said damage to the *Blue Bell* was occasioned by the negligence of those on board or in charge of the *Industrie,* and not by any negligence of those on board the *Blue Bell.*

An answer was filed by the proctor for the owners of the *Industrie*, which contained (inter alia) the following articles:—

1. The said proctor submits that this Court has no jurisdiction in respect of the matters, or things alleged by the plaintiffs in their petition herein.

If this Court has or shall have jurisdiction, then he further says:—

2. The allegations contained in the said petition are irrelevant. No damage is shewn to have been or was in fact done by the *Industrie* to the brig *Blue Bell* in the petition mentioned.

E. C. Clarkson moved the Court to order the above articles to be struck out of the answer. *Jones* v. *Boyce* (1) is an authority to shew that the plaintiffs have a good cause of action. This Court has jurisdiction to entertain the action. It has jurisdiction in respect of torts committed on the high seas, by virtue of the general law. Even if it were otherwise, the provisions of the 3 & 4 Vict. c. 65, s. 6, and of the Admiralty Court Act, 1861 (24 Vict. c. 10), s. 7, are sufficiently wide to extend to the present case. The case of *The Energy* (2), is an authority to shew that it is not necessary in order to found jurisdiction that the damage for which compensation is sought to be recovered should arise out of a collision between the plaintiff's vessel and the wrongdoing vessel: *The Night Watch* (3); *The Excelsior* (4); *The Sylph* (5); *The Clara Killam* (6). In the judgment in the case of *The Beta* (7), it is said that the words of the 7th section of the Admiralty Court Jurisdiction Act, 1861, "clearly include every possible kind of damage."

W. G. F. Phillimore. The plaintiffs have no cause of action. The case is governed by the principle acted upon in *Adams* v. *Lancashire and Yorkshire Ry. Co.* (8); *Bailiffs of Romney Marsh* v. *Trinity House.* (9) The *Industrie* was not under any obligation to exhibit a light. She was not at anchor, and she was not under weigh, and the "Regulations for Preventing Collisions at Sea" do not apply. The law imposes upon the owners of a wrecked vessel no obligation to warn other vessels of her position: *Brown* v. *Mal-*

(1) 1 Stark, 493.
(2) Ante, p. 48.
(3) Lush. 542; 32 L. J. (P. M. & A.) 47.
(4) Law Rep. 2 A. & E. 268.
(5) Law Rep. 2 A. & E. 24.
(6) Ante, p. 161.
(7) Law Rep. 2 P. C. 447, 449.
(8) Law Rep. 4 C. P. 739.
(9) Law Rep. 5 Ex. 204.

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lett. (1) The Court has no jurisdiction to entertain the action. The Court has not a general jurisdiction over damage: *The Ida* (2); and the provisions of the recent statutes do not enable the Court to entertain the present action. *The Robert Pow* (3) is a decision directly in point. In that case Dr. Lushington held that the word "damage," in the 6th section of the 3 & 4 Vict. c. 65, "must be taken according to the well-understood meaning of the phrase in the Admiralty Court, namely, damage done by collision." The *Robert Pow* (3) is cited with approval in the recent case of *The Energy.* (4) The case of *The Beta* (5) is an unsatisfactory decision on this point, and the language in which the judgment is framed is too loose to make it an authority for this case.

Clarkson, in reply. The Court has original jurisdiction over torts on the high seas: *The Sarah.* (6) *The Ida* (2) was an action brought in respect of a matter occurring in foreign waters. *Brown* v. *Mallett* (1) does not apply: *White* v. *Crisp.* (7)

SIR ROBERT PHILLIMORE. The case set up by the plaintiff, the owner of the *Blue Bell*, is as follows:—The *Blue Bell*, in the prosecution of a voyage from Shoreham to Hartlepool, was at 5 A.M. of the 16th of October, in the channel leading to the harbour at Hartlepool, under close-reefed foretop-sail and foretop-mast stay-sail, steering N. W. by N. $\frac{1}{2}$ N. The morning was dark, the tide was flood, and the wind was a gale from the S.S.W. Whilst the *Blue Bell* was proceeding in these circumstances she was obliged on account of the *Industrie* being across the fair-way of the channel without any light exhibited, suddenly to port her helm; by this manœuvre she took the ground close under the bows of the *Industrie*, and although her anchor was let go, she dragged it, and drove against the Hartlepool town wall, and thereby sustained damage from and also did damage to the wall. It is alleged by the plaintiff that the damage was occasioned by the negligence of those in charge of the *Industrie*, "in having got that vessel across the fair-way, and in leaving her there without any light exhibited, or other

(1) 5 C. B. 599; 17 L. J. (C.P.) 227.
(2) Lush. 6.
(3) Br. & L. 99; 32 L. J. (P. M. & Ad.) 164.
(4) Ante, p. 48.
(5) Law Rep. 2 P. C. 447.
(6) Lush. 549.
(7) 10 Ex. 312; 23 L. J. (Ex.) 317.

measures taken to warn other vessels of the danger:" and it is alleged that the measures taken by the *Blue Bell* were proper and necessary. The allegations in the petition, in fact, substantially amount to this: that by the negligence of those in charge of the *Industrie*, the crew of the *Blue Bell* were obliged to run their vessel ashore, and against the Hartlepool town wall.

Those articles of the answer to which the present application relates, allege that this Court has not jurisdiction to entertain the suit, and that the statements contained in the petition are irrelevant.

The 3 & 4 Vict. c. 65, s. 6, enacts that this Court shall have jurisdiction "to decide all claims and demands whatsoever in the nature of damage received by any ship." The Admiralty Court Act, 1861, s. 7, enacts that this Court shall have jurisdiction "over any claim for damage done by any ship." It is undisputed that if the *Blue Bell* had come into actual collision with the *Industrie*, the Court would have had jurisdiction to entertain any claim for damage occasioned by the collision; and I am unable to see why there should be any difference in the rights of the parties, simply because the *Blue Bell*, in order to prevent a collision with the *Industrie*, was compelled to go out of the fair-way, and in consequence received damage. If the *Blue Bell* can make out that the misconduct, or careless navigation of those in charge of the *Industrie*, rendered it necessary for the *Blue Bell* to execute the manœuvre which caused her to receive the damage, I think she is entitled to maintain this suit. There has, no doubt, been some fluctuation in the decisions as to the extent of the jurisdiction of this Court in cases of damage, but I think it is now established that this Court has jurisdiction where damage has been done or received by a ship, although there may not have been any collision between two or more ships. It has been strongly contended on behalf of the defendant that it does not appear that in this case the damage was caused by any act or default on the part of the crew of the *Industrie* amounting in law to negligence. But the principle upon which the case of *Brown* v. *Mallett* (1), referred to in support of this contention, was decided, clearly applies only to cases in which a vessel has been abandoned, or has ceased to be

(1) 5 C. B. 599; 17 L. J. (C.P.) 227.

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under the control or management of her owner or his servants. In the present case the petition does, I think, substantially aver that the acts of negligence complained of were owing to the conduct of those who were on board of or in charge of the *Industrie,* and I am of opinion that the defendants cannot contest their liability upon the suggestion that the *Industrie* had passed out of their control, without pleading facts to support that defence.

It has been contended that there was no obligation upon those in charge of the *Industrie* to exhibit any light to warn other vessels of her position. But independently altogether of the "Regulations for Preventing Collisions at Sea," I think those in charge of a vessel aground at night in the fair-way of a navigable channel are bound by the general maritime law as administered in this court to take proper means to apprise other vessels of her position. (1)

I order the articles, in the answer objected to, to be struck out; but as there have been fluctuating decisions in this court on the question of jurisdiction, I shall make no order as to costs.

Solicitor for plaintiffs: *Cooper.*
Proctor for defendants: *Stokes.*

Feb. 1.

THE ORPHEUS.

Damage—Liability of Freight—Jurisdiction in respect of Freight.

By a charterparty made on the 4th of August, between the master of the barque *O.* and a merchant, it was stipulated that the barque *O.* should proceed with a cargo of salt from Liverpool to Viborg, and there deliver the same on being paid freight. By another charterparty made on the 5th of August, between the said master and another merchant, it was stipulated that the *O.* should proceed to Viborg (with liberty to take an outward cargo for owner's benefit), and there load a cargo of deals and proceed therewith to Grimsby, and deliver the same on being paid freight as stipulated. The *O.* proceeded with her outward cargo to Viborg, and there loaded her homeward cargo and proceeded with it to Grimsby. The *O.*, while on her outward voyage, came into collision with and did damage to the barque *E.* The owners of the *E.* instituted a suit for damage against the *O.* and her freight, and upon her arrival at Grimsby arrested her, and arrested her

(1) See *The Saxonia,* Lush. 410.

homeward cargo, for the freight due in respect thereof. The value of the *O.* was not sufficient to satisfy the claim of the plaintiffs.

Held, that the *O.* was at the time of the collision in the course of earning the homeward freight, and that the homeward freight was liable to contribute to satisfy the claim of the plaintiffs.

The jurisdiction of the court in respect of freight considered.

THIS was a damage-suit instituted by the owners of the Finland barque *Emilia*, against the Norwegian barque *Orpheus*, and the freight due for the transportation of the cargo lately laden on board the *Orpheus*. In the month of August, 1870, the *Orpheus* was at the port of Liverpool, and on the 4th of that month a charterparty was entered into between her master and a Liverpool merchant, by which it was agreed that the *Orpheus* should load at Liverpool from the factors of the merchant a cargo of salt, and should therewith proceed to Viborg and deliver the same on being paid the freight stipulated for by the charterparty: the freight to be paid on right delivery of the cargo in cash. On the 5th of the same month another charterparty was entered into between the said master and a firm of merchants of Hull. By this charterparty it was stipulated that the *Orpheus* should with all convenient speed proceed to Viborg (with liberty to take an outward cargo for owners' benefit), and there load a cargo of deals, and being so loaded, should therewith proceed to Grimsby and deliver the same on being paid freight, as stipulated by the charterparty: one-half of the freight to be paid in cash on unloading and right delivery of the cargo, and the remainder by good approved bill, payable in London, at four months' date, or cash less discount.

The *Orpheus* took on board a cargo of salt at Liverpool, as stipulated by the charterparty of the 4th of August, and sailed on her voyage to Viborg. On the 31st of August, while in the course of her voyage, she came into collision with and did damage to the *Emilia*. The *Orpheus* subsequently reached Viborg, and there discharged the cargo of salt. She then took on board a cargo of deals, as stipulated by the charterparty of the 5th of August, and sailed for Grimsby. She arrived at Grimsby with the cargo of deals in October, 1870, and on the 23rd of that month she was arrested, and the cargo of deals was arrested, in the present suit. The consignees of the cargo at Grimsby, in order to procure the

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release of the cargo of deals, paid the sum of 692*l.* 2*s.*, the amount of the freight due in respect of the said cargo, into court. The suit was instituted in the sum of 3500*l.* A commission of appraisement was issued, and the value of the *Orpheus* was reported to be 2364*l.* The value of the *Orpheus* was therefore insufficient to satisfy the claim of the plaintiffs.

Jan. 17. *The Admiralty Advocate* (*Dr. Deane, Q.C.*), now moved the Court to direct the said sum of 692*l.* 2*s.* to be paid out to the owners of the *Orpheus*.

This Court has no jurisdiction to arrest freight in a damage suit. In damage suits the Court formerly exercised jurisdiction over freight, but that jurisdiction was conferred by statutory enactments which are no longer in force. By a series of statutes passed from time to time, commencing with the 7 Geo. 2, c. 15, and ending with the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104, ss. 504, 505), the measure of the shipowner's liability was made to depend upon the value of the freight. But now these provisions are no longer in force, and by the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63, s. 54), the liability of the shipowner is fixed at a maximum of 15*l.* for each ton of the ship's tonnage, quite irrespective of freight: *The Mellona* (1); *Nixon* v. *Roberts*. (2) But even if the Court has jurisdiction over freight which is in course of being earned at the time of the collision, it cannot in this case arrest the freight payable in respect of the cargo of deals, because the cargo of deals was not on board the ship at the time of the collision.

E. C. Clarkson, for the plaintiffs, the owners of the *Emilia*. From time immemorial this Court has exercised jurisdiction over freight, as an incident of the ship, and it is the everyday practice of the Court to order freight to be brought into court in damage suits. In this case the freight payable in respect of the cargo of deals was in course of being earned at the time of the collision. At the time of collision the freight never can be completely earned. The *Orpheus* was at the time of the collision proceeding to fulfil the charterparty under which the freight now in question was earned; it is quite an immaterial circumstance that she happened

(1) 3 W. Rob. 16. (2) 1 Jo. & H. 739; 30 L. J. (Ch.) 844.

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at the same time to be earning freight stipulated for by the charterparty of the 4th of August.

Lewers, for the consignees of the cargo of deals.

The Admiralty Advocate, in reply.

Cur. adv. vult.

Feb. 1. SIR ROBERT PHILLIMORE. In this case a Finland barque, called the *Emilia*, has brought her action against a Norwegian barque called the *Orpheus*, on account of damages caused by a collision on the 31st of August, about eighteen miles distant from Oland. The action is brought in the sum of 3500*l.* A commission of appraisement was issued, by which the value of the vessel was reported to be 2364*l.*; and freight upon a cargo of deals to the amount of 692*l.* 2*s.* has been paid into court; and an application is now made to the Court on behalf of the owners of the *Orpheus* to direct that sum to be paid out to them on the ground that such cargo was illegally arrested; and it is this application which the Court has now to consider.

It appears that the *Orpheus*, at the time of the collision, was on a voyage from Liverpool to Viborg, in Russian Finland; she sailed from Liverpool with two charterparties, one dated the 4th of August last, by which she contracted with a merchant of Liverpool to carry a cargo of salt to Viborg, and another dated the 5th of August last, by the terms of which she contracted with some merchants of Hull, "with all convenient speed, to proceed to Viborg, with liberty to take an outward cargo for her owners' benefit," and there, at Viborg, to take on board a cargo of deals and battens, with which she was to proceed to Grimsby. At the time of the collision she had her cargo of salt on board, with which she proceeded to Viborg, and at that place she took on board the cargo of deals, with which she proceeded to Grimsby, where she was arrested, upon a warrant from this court.

It would appear, that the value of the ship is insufficient to cover the damage which has been done, and that the freight for the cargo of deals belongs to the owners of the vessel. This cargo, as I have said, was not on board the vessel at the time of the collision.

In these circumstances, the owners of the *Orpheus* contend that

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the freight is not liable to contribute to the indemnification for the damage to which the *Emilia* is entitled, and this contention is founded upon two grounds: first, it is alleged—and the proposition is a very startling one—that this Court has at the present time no jurisdiction in the matter of freight in a cause of this description; that the jurisdiction which it formerly had was derived from the express enactments of statutes which began with the statute of 7 Geo. 2, c. 15, and was carried on by various other statutes until the year 1862, when, the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), s. 54, which limited the liability of owners on account of damage done by their ship to an aggregate amount of 15*l.* for each ton in respect of loss of life or personal injury, and to 8*l.* for each ton in respect of damage to property, repealing all former Acts on the same subject, was altogether silent on the question of freight; wherefore, it is said, this Court lost all jurisdiction over that subject in the year 1862, and has illegally exercised that jurisdiction ever since that time.

I am of opinion, however, that this branch of the contention fails on both grounds; first, because this Court did not derive its jurisdiction from statute law, but from the reason of the thing and usage, which, if not immemorial, long preceded the statutes referred to; and, secondly, because the statutes which limit the liability of the shipowner do not affect or curtail the jurisdiction of the Court in this matter. It is obvious that it may turn out that the conjoint value of the ship and freight may not amount to the statutory measure of liability.

The next and last branch of the contention was, that inasmuch as this cargo was not on board the ship at the time of the collision, but was taken on board on a subsequent voyage, the freight, though accruing to the same owner, cannot be arrested in this cause. This argument presented more difficulty to the mind of the Court, and has never, it was said, and I believe correctly, received a formal judicial decision, and I have therefore taken time to consider my judgment upon it.

As I read the charterparty which relates to the deals, I am of opinion that freight was growing due on their account though they were not on board at the time of the collision: the ship was, indeed, earning two freights at that time. With respect to the

freight upon the salt, it is enough to say that it is not within the jurisdiction of the Court. Indeed, upon the freight for the deals the shipowner had, I think, an insurable interest; and that freight, which the ship was then in course of earning, has since been received, or, to speak more correctly, has been paid into this court. If the converse of the present case had occurred—if the *Orpheus* had been the suffering instead of the wrong-doing vessel, in the restitutio in integrum to which she would have been entitled, would have been included the freight on account of this cargo of deals. I may observe that in all the statutes for the limitation of liability before the Merchant Shipping Act Amendment Act, 1862, that is in all the statutes in which the liability is measured with reference to ship and freight, the words "freight due or to grow due," are used; and in the last of these statutes the words are, "in respect of such ship during the voyage which, at the time of the happening of any such events as aforesaid, is in prosecution or contracted for" (1); and after some consideration, I am of opinion that this freight must contribute to indemnify the *Emilia* for the damage which she has sustained from the collision. I reject the motion for payment out of court of the sum of 692*l.* 2*s.* As the question is formally raised for the first time, I shall make no order as to costs.

Proctor for owners of the *Orpheus*: *Waddilove.*
Solicitors for consignees of the cargo: *Holmes & Holmes.*
Solicitor for owners of the *Emilia*: *Cooper.*

(1) The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 504.

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Dec. 9.

THE SWAN.

Jurisdiction—Practice—Transfer of Cause—Security for Costs—The County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *s.* 6—*The County Courts Admiralty Jurisdiction Amendment Act*, 1869 (32 & 33 *Vict. c.* 51), *ss.* 1, 2.

The Court of Admiralty may, by virtue of the provisions of the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), and the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), transfer to the Court of Admiralty an admiralty or maritime cause pending in a county court, and instituted there by virtue of the provisions of the County Courts Admiralty Jurisdiction Act, 1869, notwithstanding that the suit may relate to matters over which the Court of Admiralty has not original jurisdiction.

THIS was an admiralty or maritime cause instituted under the County Courts Admiralty Jurisdiction Act, 1869, and pending in the county court of Northumberland. The cause was instituted for the recovery of a claim of 100*l.* in respect of demurrage alleged to be due in respect of the detention of the vessel *Swan*.

Butt, Q.C., on behalf of the defendants, moved for an order to transfer the cause to this court. He moved on an affidavit in which it was stated that the defendants could not safely proceed to trial without the evidence of certain persons at Riga, and that, in order to obtain such evidence, it would be necessary to send out a commission to Riga. The County Courts Admiralty Jurisdiction Act, 1868, s. 6, confers power upon the Court to make the order.

E. C. Clarkson, contra. The Court has no jurisdiction to entertain a claim for demurrage. The provisions of the 6th section of the County Courts Admiralty Jurisdiction Act, 1868, apply only to causes "as to" claims such as are mentioned in that Act, and do not apply to the present suit, which is instituted under the County Courts Admiralty Jurisdiction Amendment Act, 1869. At all events, the Court will not order the cause to be transferred without requiring the defendants to give security for costs.

SIR ROBERT PHILLIMORE. The 6th section of the County Courts Admiralty Jurisdiction Act, 1868, enacts that this Court, on motion by any party to an admiralty cause pending in a county court,

may transfer the cause to this Court. If the cause in question were a cause instituted in the county court under the provisions of the County Courts Admiralty Jurisdiction Act, 1868, there can be no doubt that this Court would, by virtue of the section to which I have referred, have power to order the cause to be transferred. Then does it make any difference that the cause is instituted under the County Courts Admiralty Jurisdiction Amendment Act, 1869? The 1st section of the Act of 1869 enacts that that Act "shall be read and interpreted as one Act with the County Courts Admiralty Jurisdiction Act, 1868," and I think the legislature intended one system of procedure to apply to all causes over which the county court has jurisdiction by virtue of either of the Acts, and that the powers which this Court possesses with respect to causes instituted under the first Act may be exercised with respect to causes instituted under the second Act.

It is true that this Court has no jurisdiction to entertain a cause of this nature in the first instance; but if the legislature has given to this Court power to transfer the cause, it has thereby conferred upon the Court jurisdiction over the cause.

Good reason has been shewn why the power which the Court possesses should be exercised, and I must accede to the application made by Mr. Butt. The 6th section of the Act of 1868 enables this Court to order security for costs; but no reason has been given why security for costs should be required in this case, and, in the absence of any special reason, I ought not, I think, to impose any such terms.

Proctors for plaintiffs: *Deacon, Son, & Rogers.*
Proctors for defendants: *Dykes & Stokes.*

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Dec. 21.

THE CROMWELL.

Practice—Costs—Admission of Documents—Neglect to give Notice to admit Copies of Depositions made before a Receiver of Wreck—Admiralty Court Act, 1861 (24 *Vict. c.* 10), *s.* 19.

The plaintiffs, in a collision suit, considering the statements contained in depositions made by the crew of defendants' ship before a receiver of wreck damaging to the defendants' case, subpœnaed the receiver of wreck to produce the original depositions at the hearing of the cause, and did not call upon the defendants to admit copies. The receiver of wreck obeyed the subpœna. The Court pronounced the defendants' vessel alone to blame, and condemned the defendants in the costs of suit. The registrar, in taxing the plaintiffs' bill of costs, disallowed the costs of the subpœna and the expenses of the attendance of the receiver of wreck.

On motion to review the taxation, the Court refused to interfere with the decision of the registrar.

This was a cause of damage brought by the owners of the brigantine *Linden* against the screw-steamer *Cromwell*. The owners of the *Cromwell* appeared as defendants. At the time of the collision, which happened off Cape La Hogue, the *Cromwell* was bound for Cardiff, where she arrived a few days after the collision. The master and some of the crew of the *Cromwell* made depositions before the receiver of wreck at Cardiff. These depositions contained statements which were considered by the plaintiffs to be favourable to their case, and counsel on behalf of the plaintiffs advised that the receiver of wreck before whom the depositions were made should be subpœnaed to produce the original depositions in court at the hearing of the cause. The receiver of wreck was subpœnaed accordingly, and, in pursuance of such subpœna, he brought the original depositions into court at the hearing of the cause. The master of the *Cromwell* was called as a witness by the defendants. Upon cross-examination, he was asked by the plaintiffs' counsel whether the statement contained in his deposition was true. He said it was. The receiver of wreck was not called as a witness, but the deposition of the master was read by the plaintiffs' counsel without any objection being taken. The Court pronounced the *Cromwell* alone to blame for the collision, and condemned her owners in the costs of the suit. The registrar,

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in taxing the plaintiffs' bill of costs, disallowed the expenses of the attendance of the receiver of wreck and the costs of the subpœna to compel his attendance.

E. C. Clarkson moved the Court to review the taxation of the registrar, and to refer the plaintiffs' bill of costs back to the registrar, with directions to allow the expenses and costs so disallowed as above mentioned. It was necessary to have the receiver of wreck and the original depositions in court in order to contradict the defendants' witnesses, lest they should deny the statements contained in the depositions. The plaintiffs could not assume before the trial that the defendants' witnesses would at the trial admit the correctness of the statements contained in the depositions. A certified copy of the depositions is not admissible as evidence in a cause: *Nothard* v. *Pepper* (1); *The Little Lizzie.* (2) Even if the parties had agreed to admit a certified copy as evidence, a witness could not be contradicted by his deposition unless the original deposition were shewn to him. The rule laid down by the 24th section of the Common Law Procedure Act, 1854, applies to all courts of civil judicature in England: Common Law Procedure Act, 1854, s. 103.

Wood Hill, contrà. The Court will not interfere with the discretion of the registrar. It is usual in these cases for the parties to agree that certified copies of depositions made before a receiver of wreck may be used at the hearing of a cause for all purposes in the same manner as if they were the original depositions. That is a convenient practice, and tends to save much unnecessary expense. In the present case the plaintiffs did not call upon the defendants to make any such admission. The 19th section of the Admiralty Court Act, 1861 (24 Vict. c. 10), provides, that any party in a cause may call on any other party in the cause, by notice in writing, to admit any document, saving all just exceptions; and, in case of refusal or neglect to admit, the costs of proving the document shall be paid by the party so neglecting or refusing, unless at the trial the judge shall certify that the refusal to admit was reasonable. (3) The plaintiffs ought to have availed them-

(1) 17 C. B. (N.S.) 39.

(2) Ante, p. 56.

(3) The clause which is contained in the corresponding section of the Com-

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THE CROMWELL.

selves of that section. Because they have chosen not to do so, the defendants ought not to be saddled with extra costs.

Clarkson, in reply.

SIR ROBERT PHILLIMORE. I am satisfied that I ought not to interfere with the decision at which the registrar has arrived. It may have been perfectly right for the plaintiffs to have taken measures to secure the attendance of the receiver of wreck, and counsel may have exercised—and, I have no doubt, did exercise—a wise discretion in advising the plaintiffs to take the course they did; but it by no means follows that the expenses thereby incurred ought to be thrown upon the defendants. I am not satisfied that the object might not have been attained by the agreement of the parties to admit as evidence certified copies of the statements made before the receiver of wreck. In this case the plaintiffs did not call upon the defendants to make any admission with respect to these documents. Had the defendants refused to agree to admit certified copies after being called upon to do so, the case would have presented a very different aspect. Should any such case ever arise, my decision to-day will not affect it. I must affirm the decision of the registrar, and dismiss the motion with costs.

Solicitors for plaintiffs: *Ingledew & Ince.*
Solicitors for defendants: *Thomas & Hollams.*

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mon Law Procedure Act, 1852 (s. 117), commencing, "And no costs of proving any document shall be allowed, unless such notice be given," is not contained in the Admiralty Court Act, 1861.

THE GAUNTLET.

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Feb. 7.

The Foreign Enlistment Act, 1870 (33 & 34 *Vict. c.* 90), *ss.* 8 *and* 19—*Practice*—*Release of Ship on Bail.*

Where a cause is instituted under the provisions of the Foreign Enlistment Act, 1870, against a ship in respect of which an offence against the Act is alleged to have been committed, the Court may, with the consent of the Crown, order the ship to be released on bail.

Semble, the Court may make such order without the consent of the Crown.

Where such order is made, bail will be required for the full value of the ship and her equipment, but not for any further sum for costs.

THIS was a cause instituted under the provisions of the Foreign Enlistment Act, 1870, on behalf of Her Majesty against the steam-tug *Gauntlet*, and against all persons having, or pretending to have, any right, title, or interest in and to the said vessel. The affidavit to lead the warrant stated, in substance, as follows:—

That the said steam-tug *Gauntlet* was, on or about the said 26th day of November, 1870, and on certain days following, employed in the naval service of France, that is to say, in towing from the Downs, and from within three marine miles of the shore of England, to the port of Dunkirk, in France, a certain vessel (belonging to subjects of the North German Confederation), which last-mentioned vessel had lately been captured and taken at sea by a French vessel of war, and was then in possession of the government of France: that the institution of proceedings against the *Gauntlet*, under the provisions of the Foreign Enlistment Act, 1870, has been duly sanctioned by Her Majesty's Secretary of State for Foreign Affairs."

On the 28th of February the Court, on the motion of *Archibald*, directed a warrant to issue for the arrest of the *Gauntlet*, and in pursuance of such warrant the *Gauntlet* was arrested.

The Admiralty Advocate (*Dr. Deane, Q.C.*), *Edwyn Jones*, and *T. G. A. Palmer*, moved the Court to order the *Gauntlet* to be released on bail being given for the full value of the vessel and her equipment. Sect. 19 of the Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90), provides that the Court of Admiralty shall, in addition to any power given to the Court by the Act, have in respect of any ship or other matter brought before it in pursuance of the Act all powers which it has in the case of a ship or matter brought before it in the exercise of its ordinary jurisdiction. The Court, therefore, has power to order the ship to be released on bail as in an ordinary case.

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Sir Robert Collier (*A.G.*), *Sir John Coleridge* (*S.G.*), *Sir Travers Twiss* (*Q.A.*), and *Archibald*, for the Crown. Where an offence is committed against the Act one of the consequences which ensue is, "that the ship in respect of which any such offence is committed, and her equipment, shall be forfeited to Her Majesty": s. 8. One object of this suit, therefore, is to obtain possession of the ship; in fact, the suit resembles a suit of possession. In suits of possession it is submitted that it is doubtful whether the defendant has a right to substitute bail for the ship, although the ship may be released on bail by consent: Williams and Bruce's Admiralty Practice, p. 210, n. (b).

[SIR ROBERT PHILLIMORE. Even in causes of possession the Court will accede to an application for the release of a ship on bail where it is possible to do so without defeating the object of the suit.]

If the Court considers it has power to order the vessel to be released with the consent of the Crown, the Crown is willing to consent to the release of the vessel on proper bail being given.

SIR ROBERT PHILLIMORE. I incline to the opinion that I have power to order this vessel to be released on bail without any consent on the part of the Crown; but I entertain no doubt that I have power to do so with the consent of the Crown; and as the Crown has given its consent I shall order the vessel to be released on bail being given for the full value of the vessel and her equipment.

Sir R. Collier. And upon bail being given for costs?

SIR R. PHILLIMORE. No. I think you are not entitled to have security beyond the full value of the vessel. (1)

Proctor for the Crown: *The Queen's Proctor.*
Solicitors for defendants: *Lowless & Nelson.*

(1) The vessel was released on the required bail being given: the condition of the bond being to restore the vessel and her equipments, or the value thereof, when ordered by the Court to do so.

THE INTERNATIONAL.

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Jan. 17.

The Foreign Enlistment Act, 1870 (33 & 34 *Vict. c.* 90)—*Ship Employed in the Military or Naval Service of a Foreign State—Military Telegraphy—Employment in Connection with any Military Operation.*

Parsons
4 PC 189

At a time when there was war between France and Germany, an English company entered into a contract with the French government to lay down in the sea a series of telegraph cables, between certain places on the French coast. The places on the coast between which the cables were to be laid were so situated that by means of short telegraph lines carried over land, the series of cables could be united in one line, and be made to afford complete telegraphic communication between Dunkerque and Verdon. The company having shipped the telegraph cables on board a steam-ship belonging to them, specially fitted for the purpose of laying submarine cables, were, during the continuance of the war, about to dispatch the steam-ship from the port of London, to lay down the cables according to the contract, when the steam-ship was, by order of one of Her Majesty's principal Secretaries of State, detained upon the ground that it was about to be despatched contrary to the Foreign Enlistment Act, 1870.

On motion for the release of the ship it was proved, to the satisfaction of the Court, that the undertaking in which the ship was about to be engaged was of a commercial character; that the object of the contract was to furnish ordinary postal telegraphy, and that the company were not parties, directly or indirectly, to any project for adapting the line of cable to military purposes:—

Held, that the company were entitled to have the ship released.

Although the Court considered it probable that the line, when complete, would be partially used for effecting communication between the armies of France, it held that such probability was not sufficient to divest the line of its primary commercial character, or to clothe the service to be rendered by the ship with the character of a "military or naval service" within the meaning of the Foreign Enlistment Act, 1870.

Semble, a ship employed in the service of a foreign belligerent State, to lay down a submarine cable, the main object of which is, and is known to be, the subserving of the military operations of the belligerent State, is employed in the military or naval service of that State within the meaning of the Foreign Enlistment Act, 1870.

THIS was an application on behalf of the India-rubber, Gutta-percha and Telegraph Works Company, Limited, made in pursuance of the 23rd section of the Foreign Enlistment Act, 1870, for the release of the steam-ship *International* and her cargo.

The steam-ship *International* was a British ship, belonging to the port of London, and was the property of the said company. The company, which carried on the business of the manufacture and laying of submarine telegraph cables, purchased the ship when she was partially built, and caused her to be specially fitted for

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the purpose of laying submarine cables. The ship was completed and delivered to the company in the month of September, 1870, and she was afterwards employed by the company in laying down a submarine telegraph cable for the English Government between Jersey and England. On the 28th of November, 1870, a written contract was made between Monsieur Steénackers, Directeur-Général des Télégraphes et des Postes, on behalf of the French government of the one part, and Mr. Matthew Gray, the manager of the company, on behalf of the company, of the other part. The contract was in the French language. The following is a translation of such of the articles of the contract as are material:—

ART. 1.—Mr. Matthew Gray undertakes to lay in the channel and in the open sea (dans la manche et dans l'océan) sundry submarine electric cables of one conductor intended to connect:

1st. Dunkerque with Cherbourg.

2nd. The west coast of the peninsula of Cotentin, towards Carteret, with some point of the Bay of Brieux.

3rd. The peninsula of Quiberon with Belle Isle en Mer.

4th. Belle Isle en Mer with Royan.

5th. Royan with Verdon.

The French Government reserves the selection and designation of the line of direction of the cable, and the precise points of landing, which are to be made known to Mr. M. Gray before the vessel which is to lay it down leaves the port of London.

ART. 2.—The shore-end and deep-sea cables (le câble d'attérissement et celui de pleine mer) are to be entirely similar to the two samples left with Monsieur Steénackers by Mr. Gray.

The conductivity of the cables is to be at least equal to 85 hundredths of that of pure copper, and the insulation is to correspond to at least six hundred millions of Siemens' units at the temperature of 15 centigrades.

An officer appointed by the French Government shall ascertain before the shipping and after submersion if the cable has the required conditions, and will be present at the laying of the cable.

ART. 3.—The 1st and 4th sections to be laid down shall comprise at each of their extremities twenty kilometres of shore-end cable, the intermediate portion shall be composed of deep-sea cable.

The 2nd, 3rd, and 5th sections are to be constructed entirely of shore-end cable.

ART. 4.—At the extremities of each section a length of 500 metres of shore-end cable shall be placed at the disposal of the French administration (over and above the submerged cable) to be placed underground beyond the sea to the point of junction of the submarine and land line (ligne terrestre).

The non-submerged cable is to be paid for at the rate of 3000 francs per kilometre.

ART. 6.—The price of the cable laid, the supply of the conductor, expenses and risks of laying included, is fixed at the sum of 2,224,000 francs, in which the

price of the deep-sea cable is paid for at the rate of 1925 francs per kilometre, and the shore-end at the rate of 3000 francs per kilometre; the excess is for the expenses and risk of laying.

(The remainder of this article provides that the price shall be paid in five separate instalments.)

ART. 7.—The manufacture and shipping of the cable are to be completed within twenty-one days after the notification and approval of the present contract. Mr. M. Gray undertakes to proceed with the shortest delay possible with the laying, which is to be completed at latest on the 31st of January next. In case this last condition be not fulfilled, the French Government shall have the option of taking delivery of the cable, the property of which shall become entirely their own on payment of the two first instalments.

ART. 9.—No customs duties shall be payable on the portions of the cable landed on the coasts of France, or buried for the purposes of forming connection with the French telegraphic lines. The ship with the cable on board shall also be exempted from all duties of tonnage.

ART. 12.—The present contract is to be sanctioned by a decree of the Government of the National Defence.

London, 28th of November, 1870.

In pursuance of this contract the required quantity of cable was got ready to be shipped on board the *International*. On the 16th of December, 1870, the *International*, which was then lying in the Thames, off the company's works at Silvertown, was entered outwards by the shipping agents of the company at the Custom House, London, as bound for Bordeaux. On the same day the shipping agents passed at the Custom House the usual entry for the shipment of 1000 tons of telegraph cable on board the *International*, and obtained from the Inspector-General of Customs for the district his official permit for the shipment of the cable. The shipment of the cable was then proceeded with, and the required quantity was shipped on board the *International* on or before the 21st of December. On the 21st of December the shipping agents obtained the proper Custom House clearance to enable the ship to proceed to Bordeaux. On the same day after the clearance had been obtained, and whilst the ship remained in the Thames, she was seized by officers of Her Majesty's Customs. The officers who seized the ship produced as their authority an entry, in a book, signed by the Controller of the Customs of the Port of London. The entry was as follows:—

The *International* is under detention by directions from Lords of the Treasury, and will not be allowed to proceed to sea without the permission of Her Majesty's Government.

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Upon application to the Lords of the Treasury the company was informed that the ship was detained under instructions from Her Majesty's Secretary of State for Foreign Affairs upon the grounds of an infringement by the company of the Foreign Enlistment Act, 1870. On the 30th day of December the officers of Her Majesty's Customs received instructions not to allow any of the cable to be removed from the *International*.

Application was made on behalf of the company to the solicitor of Her Majesty's Customs for a copy of the warrant under which the *International* and her cargo were detained. A copy of the warrant was for some time withheld, but it was afterwards furnished. The warrant was as follows:—

The Right Honourable George Earl Granville, Her Majesty's principal Secretary of State for Foreign Affairs,

To Charles Edward Hunt, Controller of the out-door department of Her Majesty's Customs for the port of London, and all and every other officers and officer for the time being of Her Majesty's Customs for the said port.

Whereas, it was on or about the 21st day of December, in the year of our Lord, 1870, represented to you, the said C. E. Hunt, then and still being such controller as aforesaid, and as such controller being the local authority as defined for the purposes of such Act in and by the Foreign Enlistment Act, 1870, that there was a reasonable and probable cause for believing that a certain steam vessel called the *International*, then and now being within Her Majesty's dominions, to wit, in the said port of London, was about to be despatched contrary to the said Act:

And whereas, you, the said C. E. Hunt, then and still being such local authority as aforesaid, believing the said representation did, on the said 21st day of December, A.D., 1870, in performance of your duty under and in pursuance of the said Act, detain the said vessel, and did forthwith communicate the fact of such detention to me the said Secretary of State:

And whereas, I, the said Secretary of State, having received such communication, am satisfied that there is and was reasonable and probable cause for believing that the said vessel at the time of such detention was intended to have been despatched in contravention of the said Act.

Now, I, the said Secretary of State, do hereby, under the authority of the said Act in Her Majesty's name, ratify, confirm, and approve such detention as aforesaid, and authorize and require you, the said C. E. Hunt, as such controller as aforesaid, and all and every other officers and officer for the time being of Her Majesty's Customs for the said port of London, to seize, search, and detain the said vessel until she has been either condemned or released by process of law, or in the manner in the said Act in that behalf mentioned and provided.

Given under my hand this 28th day of December, 1870.

GRANVILLE.

The following further facts were stated in affidavits filed on

behalf of the company. Mr. Matthew Gray, the general manager of the company, stated upon affidavit as follows:—

I am well acquainted with all kinds of telegraphy, and I say that for the purposes of military telegraphy small wires of a flexible and portable nature are used with the necessary electric batteries for working them, the whole apparatus being carried about with the troops for temporary use in transmitting orders on the field or other similar purposes. The cables on board the *International* at the time of her said seizure are of the usual description of submarine cables, being strong, heavy, rigid, sheathed with iron, and quite unfit for use in military service. The said cables are intended to be permanently in the sea between fixed points.

The said contract was entered into by the Directeur-Général des Télégraphes et des Postes, who is a civil functionary answering to the postmaster-general in this country, and all telegraphic and postal arrangements throughout France, whether for public or private purposes, whether by land or sea, are under his directions, with the exception of military telegraphy, which is provided for by the minister of war and naval telegraphy, which is provided for by the minister of marine.

Neither throughout the negotiations for the said contract nor subsequently had I any communication with the French ministers for war or marine; but I communicated only with the said M. Steénackers and his secretary, M. Eugene Sauvinet, and I verily believe and still believe that the said cables were to be used for ordinary public and private business, though I have no doubt that messages might also be sent relating to military matters.

The following are extracts from affidavits made by M. Eugene Sauvinet:—

I am Sous-Chef du Secrétariat des Télégraphes et des Postes in France, and M. Steénackers is the director-general of that department of the French government. Such department is part of the civil administration of the country, and is charged with the management and direction of all the telegraphs and the post-offices and the general postal service in France.

I was in constant communication with the said M. Steénackers before and at the time of his entering into a contract with Mr. Gray on behalf of the India-rubber, Gutta-percha, and Telegraphic Works Company, Limited, of London, for furnishing and laying submarine cables for the transmission of telegraphic messages between various points on the coast of France, the extreme points being Dunkerque and Bordeaux.

At the date of such contract the seat of the French Government was at Tours, and I am certain that there was no intention on the part of the government to remove the administration to Bordeaux.

From my knowledge of the views and intentions of the said M. Steénackers at the time, I can, and do, positively say that the system of submarine cables provided for by the said contract was designed to replace or supplement the inland telegraphic communication broken or threatened by the war between various points on the French coast, and in particular to keep the great commercial port of Bordeaux in secure and direct communication with England, America, and the north of Europe, as well as with the northern ports of France.

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In France all telegraphic messages, whether public or private, are sent by the land lines or submarine cables belonging to the government; private persons sending telegraphic messages pay for the same to the telegraph clerks at the various stations, and all such clerks and stations are in the department and control of M. Steénackers, the director-general.

If the other ministers, such as the ministers of foreign affairs, finance, war, or marine, require to send messages by the telegraphic land lines or cables in France they deliver such messages in writing to the department of the director-general, and that department is bound to forward all such messages free of charge.

If, therefore, the submarine cables provided for by the said contract were laid the ministers of foreign affairs, finance, war, and marine, could send messages by such cables in the same manner as they now can send them by the existing land lines and cables under the charge of the director-general.

In France the minister of war has the charge and superintendence of all matters relating to the army and military affairs, including the providing and working of all telegraphs which are required for military purposes, whether in fortresses or in the field.

If the minister of war has to make any purchases of electric batteries, wires, or other articles for purposes of military telegraphy, all negotiations and contracts are carried on by the minister of war and the officers or agents of his department, but the Director-General of Telegraphs has nothing to do with such purchases, his department being confined to ordinary civil telegraphy for postal purposes.

The cables proposed to be laid under the contract between M. Steénackers and Mr. Gray are ordinary submarine cables for the transmission of messages, and are intended to establish a permanent communication between fixed points, and are not in any way suited for use in military telegraphy.

Cherbourg is the only fortified place at which the said intended cables were to be laid on shore, and Cherbourg is only a port fortified for protection of the ships and naval works there, and being the directest route along the coast between Dunkerque and Bordeaux was selected for a landing place for that reason.

I verily believe that the said cables, if laid, when properly connected by the French authorities with land telegraph systems and properly equipped, will be of immense commercial value not only during the disturbance of the telegraph communications by land in France, but also after the close of the war and until the internal systems of telegraphs in France shall have been completely re-established, and that even after that period the said cables will prove of considerable commercial utility by reason of the shorter and more direct lines of telegraphic communication between important places and ports of France which will be established thereby, as well as the greater accuracy in transmission of telegraphic messages, and greater independence of atmospheric influences and mechanical injury which submarine cables possess over land telegraph wires.

I know it to be intended by the French government, and I verily believe that the said cables when laid and duly completed shall and will form part of the permanent telegraph system of France, and will not be destroyed, taken up, or disused after the conclusion of the war.

An affidavit by Mr. Clare, the secretary and manager to the Submarine Telegraph Company, and an affidavit by Mr. Scuda-

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more, second secretary to the General Post Office, were filed on behalf of the Crown. Mr. Clare, in his affidavit, stated that the number of messages which the cable, if laid, would be capable of transmitting would be comparatively small; and Mr. Scudamore said:—

In my opinion the proposed cable, referred to in the said affidavits of Matthew Gray and Eugene Sauvinet would have little value for commercial purposes, and would be no longer required on the cessation of the war.

In an affidavit by Mr. Hertslet, librarian to the Foreign Office, it was stated that:—

On or about the 17th day of December last, a despatch was received at the Foreign Office from Lord Lyons, Her Majesty's ambassador in France, dated Bordeaux, Dec. 11th, 1870, transmitting an extract from the *Moniteur Universel* of that day, containing the official announcement of the removal of the seat of the delegates of the Government of National Defence from Tours to Bordeaux.

Jan. 10 and 12, 1871. *Sir John Karslake, Q.C., Hughes, Q.C., Lindley,* and *Pritchard,* moved the Court to order the ship *International* and her cargo to be immediately released, and to order the India-rubber, Gutta-percha, and Telegraph Works Company, Limited, to be indemnified by the payment of costs, and damages in respect of the detention of the ship.

In the warrant it is stated that the ship was about to be despatched contrary to the provisions of the Foreign Enlistment Act. That must mean that the ship was about to be despatched contrary to the 8th section of the Act; in other words, that the ship was about to be employed in the military or naval service of France. The cable cannot be said to be contraband of war, it will be shewn to be of an innocent character; but even if it were contraband, a British ship employed to carry it to a port belonging to a belligerent state would not be employed in any illegal act. Before the passing of the Foreign Enlistment Act, 1870, it was not illegal to carry contraband of war: *Ex parte Chevasse, In re Grazebrook* (1); and it is clear from the whole scope of the Act that it was not intended to alter the law in this respect. It is not therefore an offence against the Act to carry goods that may be used for warlike purposes. To carry cannons to Bordeaux, and land them there, would not be an offence against the Act, even though the ship's

(1) 34 L. J. (Bky.) 17. 11 Jur. N.S. 400 40 L.J.-S. 605.

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tackle were used in landing them. In order to constitute an offence against the Act, the ship must be employed or be intended to be employed in some service other than the mere carrying and delivering of goods which may be used for warlike purposes. In the present case the ship is not employed to lay down a complete telegraph. The cable is to be laid down in separate lengths at places apart from one another. The connections and the instruments necessary to render the cable available for telegraphic purposes must all be furnished before the cable can be used as a telegraph. The contract in reality provides for nothing more than the carriage and delivery of the cable, and the circumstance that the cable is to be delivered in a particular way—that it is to be laid at the bottom of the sea—does not substantially alter the nature of the employment of the ship, or constitute a service within the meaning of the Act. Suppose the *International* were to carry the cable out to sea, and then deliver it on board another ship which was engaged to lay the cable, there would be no offence against the Act. It cannot make any difference that the cable is to be laid from the *International*. The laying of the cable cannot be said to be a military or naval service. The 30th section of the Act provides that military service shall include military telegraphy. But the cable in question is not a military telegraph. Military telegraphy is a well-known term, and is applied to telegraphs of a description entirely different from submarine telegraphs: Colonel Hamley's Operations of War Explained and Illustrated, 2nd ed. p. 211. The words "military" and "naval" occur several times in the Act, but they are always associated together, except in the interpretation clause. In the interpretation clause military telegraphy is mentioned in connection with military service, but telegraphy is not mentioned in connection with naval service, and for a very good reason, because there is no such thing as telegraphy in connection with naval service. Military telegraphy is a term quite inapplicable to telegraph cables laid down at sea, and the express mention of military telegraphy in the Act leads to the presumption that it was not intended to prohibit services in connection with ordinary telegraphy. Expressio unius est exclusio alterius. The whole of the circumstances shew that the telegraph cable was intended for commercial purposes. The con-

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tract was made at a time when the seat of the French Government was at Tours, and when there was no intention of transferring the seat of government to Bordeaux; and with a civil functionary, the director of telegraphs, and not with the minister of war, whose duty it is to superintend the French military telegraphs. If the main object for which the cable was intended was to afford communication for commercial or general purposes, a ship employed in laying the cable cannot be said to be employed in a military or naval service. The main object for laying the cable was permanently to improve the communication between Bordeaux and the other ports of France and England and America. The large sum to be paid, nearly 89,000*l.*, renders it impossible to suppose that it was intended merely for temporary use during the war. No doubt the cable when laid down might prove useful for the purposes of the war; but that circumstance does not render the laying down of the cable a military service. For instance, it cannot be said that because military despatches are occasionally forwarded through the French post-office, that persons employed in the French post-office are employed in the military service of France. Unless the contract for laying the cable was entered into by the French Government with the express object of assisting their warlike operations, the laying down of the cable cannot be said to be in any way a military service. The character of the service performed in laying down the cable must be determined by the nature of the purpose for which the cable was intended, and cannot be affected by the circumstance that the cable may possibly, when laid down, be applied to other purposes than those for which it was intended. It is clear that the officers of the customs had no authority to detain the cargo. The Act is a highly penal one, and should be strictly construed.

The company has acted with perfect good faith throughout the matter; it has concealed nothing, and from the first the officers of customs and the secretary of state had full information concerning the commercial character of the undertaking. There was therefore no reasonable or probable cause for the detention of the ship. The detention of the ship has occasioned very serious loss to the company, and the company is by the provisions of the 21st section entitled to be indemnified by the payment of costs and damages in respect of the detention.

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Sir Robert Collier (*A.G.*), *Sir J. D. Coleridge* (*S.G.*), *Sir Travers Twiss* (*Q.A.*), and *Archibald*, on behalf of the Crown. It is admitted that the Act was not intended to alter the previously existing law as to contraband of war. But although dealings of a commercial character between private persons remain unfettered, it by no means follows that the same indulgence is to be granted to persons who enter into engagements with a belligerent government for the supply of warlike stores. By the 30th section of the Act the phrase "naval service" is made to include any user of a ship as a transport or store-ship, and it is clear that the *International* was to be employed in the service of the French government. But the service in which the ship was to be employed was something more than the mere carrying and delivering of the cable. The laying down of a submarine cable is a difficult operation, and requires great skill, and can only be successfully performed by means of ships specially constructed for the purpose and fitted with the requisite machinery. Laying a submarine cable is a service of a special and important nature, and when such service is performed in order to keep up communication between military forces, it is a military or naval service: Wheaton's International Law, Dana's edition, note to s. 504, p. 638. The phrase "military or naval service" is wide enough to include any service in connection with warlike operations. The extract quoted from Colonel Hamley's book relates to field telegraphy, which is only one kind of military telegraphy. But even if the phrase "military telegraphy," used in the interpretation clause of the Act, is to be read as applying only to field telegraphy, that does not affect the question, because the interpretation clause is clearly not intended to narrow the meaning of the phrase "military service." The interpretation clause merely gives examples of the things which are included in military service. The words, "shall include," shew that the interpretation clause is not intended to supply an exhaustive definition. Moreover, setting the phrase "military service" aside, naval service in connection with a military operation would be contrary to the Act. The real question in the case is, whether the main object of laying the cable was to subserve military operations; if it was, then the laying of the cable must be regarded as a military or naval service. In determining the question whether the cable

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was intended to subserve military operations, the Court must have regard to all the attendant circumstances.

[SIR ROBERT PHILLIMORE. You mean that the Court may be guided by the analogy afforded by the law of contraband as applied to things ancipitis usus?]

Exactly so. *The Jonge Margaretha.* (1) See also the notes in Tudor's Leading Cases on Mercantile and Maritime Law, 2nd ed. 847. This is a contract made with an official of the French government on behalf of the government. The government is the "Government of National Defence," which was called into existence for the very purpose of carrying on the war. At the time the *International* was seized, Bordeaux was the seat of the French government; it is true that the seat of government was not removed to Bordeaux until some days after the date of the contract, but at the time the contract was signed the French government must have known that the seat of government was shortly to be removed to Bordeaux. It is notorious that the communications by land between the north and south of France were to a great extent interrupted, and to a still greater extent endangered by the German armies, and it is obvious that the object of the cable was to open a new and safe means of communication between the seat of government and the armies in the field and the arsenal at Cherbourg. In the condition in which France now is communication is needed so much more for military purposes than for commercial purposes, that the conclusion that the cable was intended mainly for military purposes is irresistible. It is for the applicant "to establish to the satisfaction of the Court" that the ship was not intended to be despatched contrary to the Act (s. 23). This throws the onus of proof upon the company. But whatever view the Court may take of the case upon the merits, the Court will not declare that the owner is to be indemnified by the payment of costs and damages. There was certainly reasonable and probable cause for the detention. It is not denied that the company has acted with perfect candour in the matter, and on that account the Crown has not instituted proceedings for the condemnation of the vessel. The Crown has simply done what it was bound to do to prevent a breach of the law, and it is now willing

(1) 1 Rob. 189.

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to consent to the release of the vessel on the company giving security, according to the provisions of the 23rd section, to the satisfaction of the Court that the ship shall not be employed contrary to the Act.

Sir John Karslake, Q.C., in reply. The 23rd section cannot be intended to throw the onus of proof on the applicant. The company decline to enter into any such bond as that proposed, and they ask for an unconditional release of the ship, and for costs and damages.

Cur. adv. vult.

Jan. 17. SIR ROBERT PHILLIMORE. This is an application under the 23rd section of the statute 33 & 34 Vict. c. 90, by the India-rubber, Gutta-percha and Telegraph Works Company, Limited, the owners of the ship *International* and her cargo, for the release of that vessel and cargo, which have been and are now detained by the order of the Secretary of State under the provisions of the same statute.

This statute, passed during the last session, under which the authority of this court is now for the first time invoked, is, in my judgment, very important and very valuable—strengthening the hands of Her Majesty's government, and enabling it to fulfil more easily than heretofore that particular class of international obligations which may arise out of the conduct of Her Majesty's subjects towards belligerent foreign states with whom Her Majesty is at peace.

It is the duty, I think, of the Court, upon whom is devolved the application of this statute to particular cases, so to construe it as on the one hand to give, if possible, due and full execution to its main purpose, and on the other hand not to strain the provisions of it so as to fetter the private commerce of Her Majesty's subjects beyond the express limits which the statute, for the general interests of the public weal, has prescribed.

The statute provides, among other things, "that if any person within Her Majesty's dominions despatches, or causes, or allows to be despatched, *any ship* with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war

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with any friendly state, such person shall be deemed to have committed an offence against this Act."

Then certain penalties ensue to the person and to the ship. It is with the latter only that this court is concerned.

The Act confers special powers on the Secretary of State (s. 23), which he may exercise in two ways; he may issue a warrant for the detention of a suspected vessel, and then simply detain such vessel, taking no further proceedings, and leaving the owner to make his application for release to this court, or, he may proceed to obtain the condemnation and forfeiture of the vessel to the Crown. The Secretary of State in this instance has taken the former and milder course, and does not, I am informed by the Attorney-General, think it a case in which further or more serious steps should hereafter be taken. *Interest reipublicæ*, it is said, that this vessel should suffer a temporary detention, or if released by order of this court, that such release should be accompanied by a special bond, entered into by the owners of the vessel, giving security against any belligerent or un-neutral use of the vessel or her cargo; but the vessel is not to be proceeded against for any severe penalty. The owners of the *International* and her cargo, however, are applicants to this court both for the immediate and unconditional release of the vessel and cargo, and for the costs and damages occasioned by the official seizure.

I must now draw attention to the facts of this case as they appear on the affidavits, and as they are connected with others which are matter of general notoriety. The vessel herself, it is admitted, independently of her peculiar cargo is not per se in any way adapted for purposes of war. Mr. Gray, the manager of the company, swears that "the said company carries on, amongst other things, the business of the manufacture and laying of submarine telegraph cables, and that on or about the 7th day of July, 1870, the said company purchased the said ship, then partially built, and caused the same to be specially fitted for the purpose of their ordinary business of laying submarine cables as aforesaid."

She was purchased by her present owners—the India-rubber, Gutta-percha and Telegraph Works Company, on the 7th of July in last year. At that time the terrible and devastating war, which very soon afterwards began to cover France with blood, had not

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broken out. At the time of the purchase the ship was partially built, and was subsequently, as is sworn by Mr. Gray, "specially fitted for the purpose of their ordinary business of laying submarine cables." The ship was delivered as completed to the company in the month of September, and was shortly afterwards let by the company to Her Majesty's Government for the purpose of laying a submarine cable between England and Jersey, which task was successfully performed. On the 28th of November the company entered into a contract with the director-general of telegraphic and postal service in France to furnish and lay down certain submarine cables. It will be important to notice presently the principal features of this contract.

On the 21st of December, while lying in the Thames with cable on board of the kind required for the fulfilment of her contract, the *International* was seized by officers of the Customs, and on the 28th was detained by a warrant from the Secretary of State for Foreign Affairs.

The contract to which I have referred was entered into between the company and the French Government, represented by the Director-General of Telegraphs and Mails, subject, however, to subsequent sanction (Art. 12) by decree of the Government of National Defence. According to the terms of this contract the company were to lay down in the channel and in the ocean various electric submarine cables of one conductor intended to connect— 1st. Dunkerque with Cherbourg. 2nd. The west coast of the Peninsula of Cotentin, towards Carteret, with some point of the Bay of St. Brieux. 3rd. The Peninsula of Quiberon with Belle Isle en Mer. 4th. Belle Isle en Mer with Royan. 5th. Royan with Verdon. The cable is described as being of two kinds, a submarine cable and a land or shore-end cable ("câble d'attérissement et celui de pleine mer"); they were to be made in conformity with models which were produced in court.

By the first article, "the French government reserves the selection and designation of the line of direction of the cable, and the precise points of landing, which are to be made known to Mr. Matthew Gray before the vessel which is to lay it down leaves the port of London."

By the 3rd article, "the 1st and 4th sections to be laid down"

(that is, (1) Dunkerque to Cherbourg, and (4) Belle Isle en Mer to Royan) "shall comprise at each of their extremities twenty kilometres of cable of the land model; the intermediate portion shall be composed of cable of the model for deep seas."

"The 2nd, 3rd, and 5th sections are to be constructed entirely of land cable;" that is to say, "(2) the west coast of the Peninsula of Cotentin, towards Carteret, with some point of the Bay of St. Brieux; (3), the Peninsula of Quiberon with Belle Isle en Mer;" "(5), Royan with Verdon." The contract further provides (Art. 4), that "At the extremities of each section a length of five hundred metres of land cable shall be placed at the disposal of the French administration, over and above the submerged conductor, to be placed underground beyond the sea to the point of junction of the submarine and land line."

The whole sum to be paid to the company was not quite 90,000*l.* in five instalments (Art. 6). The operation of laying down the several cables was to be completed by the 31st of January, that is, of this month (Art. 7). In case of non-fulfilment the French government were to take possession of the conductor, the ownership of which was to be theirs after the payment of the two first instalments.

It appears, therefore, that there was one undivided contract to lay down a series of cables, extending from Dunkerque to Verdon, at the mouth of the Garonne, with the exception of certain portions of land, a telegraphic communication over which would be necessary to complete the connection between the two extremities mentioned. With this connection the company had no concern, except in so far as 500 metres of land cable, or rather of additional shore-end, were, under Article 4 already mentioned, to be provided by them, and placed at the disposal of the French government. It has appeared from the material portions of the contract, to which I have adverted, as well as from the ordinary functions of the company, that, primâ facie at least, this undertaking had not for its object any employment "in the military or naval service" of France. It was apparently a bonâ fide commercial undertaking between the subjects of Her Majesty and a government in friendly relations with her. And the Attorney-General was express and clear in his statement that no mala fides or deception of any kind

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was imputed to the company, but a violation, through ignorance, of the law. It was also admitted, as I fully expected it would be, by the Attorney-General that this statute in no way affects the previously existing international law as to contraband; that the proceedings taken in this cause have no reference to an offence of this kind. I have not therefore to consider whether, as suggested by the Queen's Advocate, this vessel might have been seized by a Prussian cruiser as being employed in the service of France, or as carrying contraband of war of a novel kind, but falling under the old principle.

The carrier of contraband may violate the proclamation of the neutral state of which he is a member, and deprive himself of the right to protection from her, but the punishment of his offence is, by the general law of nations, left to the belligerent who has the right of capture. The offence is not cognizable by the municipal law of this country.

It occurred to me during the argument that the only bearing of the law of contraband on the present case might arise from the analogies furnished by that law, namely, that as "circumstances arising out of a particular situation of the war and condition of the parties engaged in it" (*The Jonge Margaretha*) (1) might clothe an article ancipitis usus with the character of contraband, so it might be argued that the cargo of the *International*, innocent in ordinary circumstances, might, in those of the present war, bring the vessel within the category of a ship despatched for employment "in the military or naval service" of France.

I shall bear this analogy in mind in considering the further arguments addressed to me by the law officers of the Crown which I am about to notice.

The counsel for the Crown have strongly contended that, considering all the circumstances of the case, those who despatched the *International* and her cargo had, notwithstanding the language of the contract, either "intent and knowledge," or at least "reasonable cause to believe," that she would be employed in the military service of France. First, it is pointed out that the contract is with the French government. Secondly, it is said that the state of France at the period of the date of the contract was such as to

(1) 1 Rob. 189.

render it impossible to believe that the government could have contemplated laying a cable for commercial purposes mainly or alone. Thirdly, that the places to be united by the cable, especially Dunkerque, Cherbourg, and Bordeaux, through Verdon, were fraught with suspicion, as affording the inception at least of means of communication between the main armies of France, the value of which could not be over estimated to the defenders of that country in her present position. Fourthly, it was especially pressed upon the Court that the contract was entered into very shortly before the removal of the government to Bordeaux, and must have been intended to facilitate the communication of the government in its new seat with the rest of France.

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On behalf of the applicants it has been alleged that the telegraphic line is strictly civil and postal, and not military; that the statute has specifically provided that to furnish "military telegraphy" shall be considered an employment in the military service of the state to which it is furnished; that "military telegraphy" is, according to a recognized scientific definition, of a wholly different kind and character from ordinary civil postal telegraphy; and this fact was, indeed, not denied by the counsel for the Crown; but I must observe that to maintain that "military and postal telegraphy" are different in kind, is one proposition; and to maintain that therefore postal telegraphy, though proved to be employed exclusively or mainly for military purposes cannot be considered as being employed in the military service of the state so as to fall within the purview of the statute, is another and a very different proposition to which I am not disposed to assent. The statute by specifying "military telegraphy" has not, in my opinion, excluded the possibility of shewing that in the particular circumstances of the case "postal telegraphy" may be considered as telegraphy employed in the military service of the state.

The question is, whether there is evidence before me in the present case to prove that the real object of this postal telegraphy was and must have been known to be the subserving as its main end and purpose the military service of France. The positive evidence is entirely in favour of the applicants. I do not say that such evidence is necessarily binding upon the Court, or that the counter-presumption may not be so strong as to render such

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testimony null. Lord Stowell somewhere says, "It is the idlest of all conceits that a Court is bound by mere swearing;" the swearing must, of course, be credible. But the presumption must be very strong to overbear the testimony furnished in this case by the affidavits both of the French and English witnesses, especially where no mala fides or want of candour is ascribed to the applicants. The company is formed to furnish ordinary postal telegraphy, and the contract with the French government is to furnish telegraphy of this kind only; no other kind is to be furnished. It is inapt, per se, for land telegraphy, much more for military telegraphy; it is credibly sworn, I think, that the applicants are no parties, directly or indirectly, to any intention or project of adapting this so to speak civil telegraphy to military purposes; no such adaptation is within the letter or spirit of their contract. The present circumstances of France are certainly such as to make the means of communication between her armies and her government of the utmost value to her. It is probable that this telegraphic line from Dunkerque to Verdon will be partially used for effecting or endeavouring to effect such communication. But neither does this appear to be the main object of the line, nor could it, without additions and adaptations, with which this company has no concern, be made even partially to subserve this end. On the other hand, there is nothing incredible in the statement that commercial interests are largely concerned in the establishment of a postal telegraphic line between Dunkerque and Verdon at the mouth of the Garonne, due regard being had to the great and increasing commercial importance of Bordeaux. It is, however, probable, as I have said, that the line may be occasionally used for military among other purposes; but such a probability is not sufficient to divest the line of its primary and paramount commercial character, and to subject this company to the very severe penalties imposed by the statute.

After a careful consideration of the statute and of the facts of the case, I have arrived at the conclusion that the applicants have made out their claim to have this vessel released. They, it is admitted, have acted with candour and with good faith toward the government, and I do not think that I ought to clog this release with the bond proposed by the Attorney-General—the conditions

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of which, I may observe, were very generally hinted at, and which might not be easy to frame. Be this, however, as it may, I do not impose such a condition on the release which I decree.

I am, however, of opinion that, having regard to the peculiar circumstances of the case, which I need not repeat, Her Majesty's government took a correct view of the grave obligations which this statute imposed upon them, and that there was "a reasonable and probable cause" for the detention of this ship and cargo, and for putting the applicants upon their defence; I therefore make no order as to costs or damages.

Proctor for the Crown: *The Queen's Proctor.*
Proctors for the defendants: *Pritchard & Sons.*

THE HELEN R. COOPER.

Jan. 24.

Practice—Consolidated Causes.

The Court will, where it is convenient to do so, order one of several consolidated causes to be referred to the registrar separately.

On the 5th of October a suit (No. 5480) was instituted in the amount of 1000*l.* on behalf of the master of the *Helen R. Cooper* for wages and disbursements. On the same day a suit (No. 5481) was instituted on behalf of the chief officer of the *Helen R. Cooper* for wages. On the 6th of October the two suits were ordered to be consolidated. On the 14th of October a second suit (No. 5490) was instituted on behalf of the master in the amount of 500*l.* for wages and disbursements. The suit (No. 5490) was instituted by the master because the amount in which suit (No. 5480) was instituted was insufficient. On the 17th of October an order was made that suit No. 5490 should be consolidated with the suits Nos. 5480 and 5481.

Cohen, on behalf of the chief officer, the plaintiff in suit No. 5481, moved that that cause should be referred to the registrar separately, notwithstanding the orders for consolidation. Claims are made against the ship by the holders of a bottomry bond, by which the master, the plaintiff in suits Nos. 5480 and 5490 had

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bound himself personally, and the proceeds are insufficient to pay all the claims.

E. C. Clarkson, on behalf of the master, asked that the order should be made without prejudice to the costs occasioned by the application.

SIR R. PHILLIMORE. I see no reason why the Court should not make the order asked for by Mr. Cohen. There is no rule to prevent one of several consolidated causes being referred separately where it is convenient to adopt that course. I make the order asked for, but I reserve all questions as to the costs occasioned by the application.

Solicitors for the plaintiff in causes 5480 and 5490: *Thomas & Hollams.*

Proctors for the plaintiff in cause 5481: *Fielder & Sumner.*

Feb. 1.

THE MARKLAND.

Practice—Priority of Decree—Payment of Money out of Court—Caveat against the payment of Money—Revocation of Decree in Suit in rem.

The rule that the Court will give priority to the suitor who first obtains a decree applies only as between claimants in pari conditione.

Where, in a suit in rem., a decree has been made per incuriam for the payment of money out of the proceeds in court to satisfy the claim of the plaintiff, the Court may, before the money has been paid, revoke or vary the decree.

ON the 21st of October, 1870, a cause of co-ownership (No. 5495) was instituted on behalf of Thomas Ellis, the owner of forty-eight sixty-fourth shares of the vessel *Markland,* against the *Markland.* On the 24th of October an appearance was entered in the cause on behalf of Robinson, Inglis & Co., first mortgagees of the ship in possession. On the 27th of October an appearance was entered in the cause on behalf of Sidney Toppin, second mortgagee of the ship. On the 3rd of November the Court, by an order made in the cause, decreed the *Markland* to be appraised and sold, subject to certain charterparties which had been entered into by her owners. The *Markland* was

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sold accordingly, and the proceeds of the sale were brought into the registry by the marshal. On the 16th of December, a cause of Wages (No. 5575) was instituted on behalf of John Thomas and others, the crew of the *Markland*, against the proceeds arising from the sale of the vessel. On the 21st of December, a cause of Necessaries (No. 5560) was instituted on behalf of John Dawson, shipwright, against the *Markland*. On the 10th of January, 1871, the Court pronounced the sum of 30*l.* to be due to the plaintiffs in suit (No. 5575), and directed the said sum and costs to be paid out of the proceeds in court, to the solicitors of the plaintiffs, for the benefit of the plaintiffs. The said sum and costs were paid to the said solicitors. On the 17th of January, 1871, the cause of Necessaries (No. 5560) came on for hearing, and no person appearing to contest the claim of the plaintiff, the Court, on proof being given in support of the claim, pronounced the sum of 57*l.* 5*s.* 5*d.*, together with costs, to be due to the plaintiff in the said suit; and the judge signed an order for the payment of the said sum out of the proceeds in court to the proctor of the said plaintiff. Before the money mentioned in the order was paid, the proctors for Robinson, Inglis & Co., the first mortgagees, entered a præcipe for a caveat against the payment of any sum out of the proceeds of the *Markland*, and a caveat was entered accordingly. On the 23rd of January, a cause of Wages (No. 5619) was instituted on behalf of the master of the *Markland*, against the proceeds of the vessel.

The proceeds were insufficient to meet the unsatisfied claims of the several parties in the said suits, and the question arose, whether the decree which the Court had pronounced in favour of the claim of the plaintiff in the suit for Necessaries (No. 5560), entitled him to have the amount pronounced to be due to him to be paid out of the proceeds in court in priority to the claims of Robinson, Inglis & Co., and Sidney Toppin, the mortgagees (1).

Jan. 24. *E. C. Clarkson*, on behalf of John Dawson, the plaintiff in the suit for Necessaries (5560), moved the Court to overrule the caveat entered on behalf of the mortgagees, and to condemn the mortgagees in costs. Dawson has obtained the de-

(1) Other questions arose which it is not necessary to notice.

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cree of the Court in a suit in rem, and he is entitled to priority: *The Saracen* (1); *The Gustaf* (2). The practice of the Court is thus stated in Coote's Admiralty Practice: "According to the priority of time in which each claimant has obtained his decree, pronouncing for his claim and costs, so will be his right to be paid, in preference to the others where there are several actions, out of the fund in court"—2nd ed. p. 133. It sometimes happens, where there are several suits against the same property, and a decree is pronounced in one of the suits before the other suits are ripe for hearing, that the decree is expressly stated to be made without prejudice to the rights of other claimants who may be entitled to priority, but in the present case the decree was absolute in its terms. The Court not only decreed that the plaintiff was entitled to the money claimed, but actually ordered the money to be paid out, and that order was signed by the judge. The Court cannot now recall that order. The other claimants have forfeited their right to priority by their own laches. At all events, the Court will give the plaintiff in the suit for necessaries the costs to which he has been put in consequence of the neglect of the other claimants to enter a caveat in due time.

Feb. 1.—*Butt, Q.C.*, and *Gibson*, on behalf of Robinson, Inglis & Co., first mortgagees of the ship, opposed Clarkson's motion, and moved the Court to direct the amount due to the said first mortgagees to be paid out of the proceeds. The rule that preference will be given to the suitor who first obtains a decree applies only where the several claimants are in pari conditione: *The William F. Safford.* (3)

[SIR ROBERT PHILLIMORE. Have not the parties for whom you appear been guilty of laches in neglecting to enter a caveat until after decree pronounced in the suit for necessaries? At the date of that decree no caveat had been entered by them.]

If a caveat had been entered, Robinson, Inglis & Co. would have been in precisely the same condition as they are now. According to the practice of the court, a party entering a caveat

(1) 2 Wm. Rob. 451; 6 Moo. P. C. 56.

(2) Lush. 506; 31 L. J. (P. M. & A.) 207.

(3) Lush. 69.

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against the payment of money does not receive notice of an application by other parties for an order for payment of money out of court. The practice of the Court in this respect is unsatisfactory. It is not until an order for the payment of money out of court is made, and is about to be acted upon, that he receives notice: Williams & Bruce's Admiralty Practice, p. 230, n (b).

[SIR ROBERT PHILLIMORE. Had a caveat been entered the Court would have had notice.]

That may be so, but it is not too late now to prevent injustice being done. The proceeds are in the hands of the Court, and the Court has full power to rectify an order made per incuriam.

W. G. F. Phillimore, for the second mortgagee.

Dr. Tristram, for the plaintiff in suit (No. 5495).

Pritchard, for the plaintiff in suit (No. 5619).

Clarkson, in reply.

SIR ROBERT PHILLIMORE. The claimant for necessaries in this case does not dispute that the mortgagees have a prior lien upon the funds in court, but he maintains that the advantage of that priority has been taken away from them by reason of his obtaining a decree, which took the form of a signed order, for the payment of his claim. The cases of *The Saracen* (1) and *The Gustaf* (2), which have been cited, apply to claimants of equal degree, and do no more than enforce a well-known principle—that a diligent creditor shall have the advantage of his diligence over a remiss creditor; but there is no authority, that I am aware of, which has decided that this doctrine can be extended to a case where the parties are not in pari conditione, but where one has a distinct legal priority over the other. The contrary, I think, appears to have been laid down in the case of the *William F. Safford,* referred to by Mr. Butt. (3)

With regard to the fact that the order for payment in this case was actually signed by me, I cannot hold that upon that ground the Court is functus officio. The Court has not parted with the funds; and, after it has been apprised that by so doing it would be inflicting an injustice upon parties who have a prior legal claim

(1) 2 Wm. Rob. 451; 6 Moo. P. C. 56.

(2) Lush. 506; 31 L. J. (P. M. & A.) 207.

(3) Lush. 69.

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over those funds, it would be strange indeed if the Court had not power to prevent the execution of the order. I am clear that I have power, and ought to exercise it, to prevent the execution of that order, the effect of which would be to do a wrong to a party who has established priority in his claim. (1)

With regard to the question of costs, I must refer to the 130th rule of the Court:—"A proctor desiring to prevent the payment of money out of the registry shall file a præcipe, and thereupon a caveat shall be entered in a book to be kept in the registry, called the Caveat Payment-book." No such caveat was filed by the mortgagees at the time the order was made for the payment of the claim for necessaries; and I am of opinion that in this case the want of compliance with the rule, and the other circumstances, justify Mr. Clarkson in his application for the costs to which he has been put, and I shall, therefore, give him the costs.

I may observe that, after the discussion which took place the other day with respect to the rule of Court to which I have referred, I have thought it right, after conferring with the registrar, to issue an order to the effect that for the future any person who has entered a caveat against the payment of money shall receive a notice previously to any application by any other party for the payment of money in the matter in which the caveat has been entered. I direct that the claim pronounced for in the cause for necessaries shall rank in order of payment after the claims of the master and mortgagees. I reject Mr. Clarkson's motion to overrule the caveat, and I condemn the first mortgagees in the costs occasioned by their delay in entering a caveat against the payment of the claim for necessaries.

Proctors for the plaintiff in suit (No. 5560): *Clarkson, Son & Greenwell.*

Proctors for the first mortgagees and for the plaintiff in suit (No. 5619): *Pritchard & Sons.*

Solicitor for the second mortgagee: *H. S. Hubbard.*

Solicitors for the plaintiff in suit (No. 5495): *Lea & Saunders.*

(1) See *The Monarch*, 1 Wm. Rob. 21.

THE TWO ELLENS.

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Feb. 15.

Necessaries supplied to a British Vessel—Mortgage—Priority—Maritime Lien—Admiralty Court Act, 1861 (24 *Vict. c.* 10), *ss.* 4, 5.

A British colonial vessel was mortgaged by her owners to B. The instrument of mortgage was duly registered. In February, 1868, in the port of London, the plaintiffs, by the order of the master, did work and furnished supplies to the ship necessary to put her in a seaworthy condition. In July, 1868, B. executed an instrument for the transfer of the mortgage to the defendant. This transfer was without valuable consideration, and was made to enable the defendant to take charge of the ship for B. In July, 1868, the defendant took possession of the ship. Afterwards the plaintiffs instituted a suit against the ship to recover the amount due to them for the work and supplies. At the time of the institution of the suit the owners of the ship were domiciled in Nova Scotia. The proceeds of the ship were insufficient to satisfy the claim of the plaintiffs and the mortgage debt:—

Held, that the plaintiffs were not entitled to have the amount of their claim paid out of the proceeds until the mortgage debt had been satisfied.

The 5th section of the Admiralty Court Act, 1861 (24 Vict. c. 10), considered. *The Pacific* (Br. & L. 243) commented on.

THIS was a cause instituted under the provisions of the Admiralty Court Act, 1861 (24 Vict. c. 10), against the ship *Two Ellens*, to recover a sum of money claimed by the plaintiffs for work done and supplies furnished by them to the ship. John Alexander Black, who claimed to be entitled as the transferee of a mortgage on the ship, intervened as defendant, and gave bail in the suit. The value of the ship, and consequently the amount of bail, was not sufficient to satisfy the claims of the plaintiff and the mortgage debt.

Pleadings were filed in the suit, but after the pleadings had been brought to a conclusion some of the facts were agreed upon between the parties, and were stated in the form of a special case, which was as follows:—

CASE.

1. The plaintiffs are shipbuilders, carrying on business at Millwall.

2. The defendant is a merchant, who was the agent of Messrs. Black Brothers & Co., hereinafter mentioned.

3. The *Two Ellens* was and is a British colonial vessel, belonging to the port of Digby, in Nova Scotia, of which no owner or

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part owner was, at the time of the institution of this suit, domiciled in England or Wales.

4. Cornelius McBride, Dennis Falvey, and William Hogan, all of Weymouth, in Nova Scotia, were the duly registered owners of the said vessel, which was commanded by the said Dennis Falvey.

5. By an instrument of mortgage in the form prescribed by the Merchant Shipping Act, 1854, bearing date the 9th of March, 1867, and executed by the said registered owners, the said owners mortgaged their sixty-four sixty-fourth shares in the said vessel to George J. Troop, a member of the said firm of Black Brothers & Co., of Halifax (1), in consideration of gain, for the purpose of securing the repayment of the sum of 5000 dollars, advanced by the said firm of Black Brothers & Co., to the said owners, together with interest on the said sum. This mortgage has been duly registered.

6. About the month of February, 1868, the said vessel, which had arrived in the port of London shortly previous to that date, and completed her then voyage, was lying in that port, and the said Dennis Falvey, being the master and part owner of the said vessel, applied to the plaintiffs to do certain work and furnish certain supplies to the said vessel, which the plaintiffs accordingly did and made. The following is a copy of the account of the plaintiffs in respect of such work and supplies, viz. :—"To making and fitting 22 beam riders and 6 iron hanging knees, preparing blocks and docking, caulking from keel to metal line and paying over bottom, finding and bringing on felt and zinc sheathing to 9 feet and 8 feet 6 inches mark and undocking as agreed 10 watermarks. Making stage and re-fastening quarter piece and 4 graving pieces in bottom. Watermen moving ship twice. Cash paid for insurance." It has been agreed that such account shall be taken to contain a correct statement of the items of the plaintiffs' claim. There is now due and owing to the plaintiffs, for and in respect of the said work and supplies, a certain sum of money.

7. By an instrument of transfer, dated the 16th of July, 1868, in the form prescribed by the Merchant Shipping Act, 1854, and executed by the said George John Troop, in consideration of the sum of 5000 dollars, alleged in the said instrument of transfer to

(1) Nova Scotia.

have been paid to the said George John Troop by the defendant, the said George John Troop transferred to the defendant the said mortgage. This instrument has never been registered according to the provisions of the Merchant Shipping Act, 1854.

8. In fact no money was ever paid by the defendant to George John Troop in consideration of the transfer of the said mortgage, but such transfer was only made in order to enable the defendant to take charge of the said vessel, in trust for and on behalf of the said firm of Black Brothers & Co.

9. The plaintiffs were never informed and did not know that the said vessel was mortgaged.

10. In the month of July, 1868, the defendant took possession of the said vessel, and shortly afterwards, the said sum of 5000 dollars being still unpaid, put her up for sale, when she was bought in by Cannon & Co., merchants of Liverpool, as agents in Liverpool for the said firm of Black Brothers & Co.

11. This cause was instituted on the 23rd of December, 1868, as a cause of necessaries, but the plaintiffs did not then extract a warrant for the arrest of the said vessel. On the following day two of the crew of the said vessel instituted a cause of wages, and caused her to be arrested, whereupon the plaintiffs amended the precipe, by which they had instituted the said cause, by striking out the words "of necessaries," and leaving instead of those words a blank in such precipe, and they, on the 26th of the same month, extracted a citation in rem, which was duly served whilst the said vessel was under arrest as before mentioned in the said wages suit.

12. The printed evidence of C. H. M. Black, one of the partners in the said firm of Black Brothers & Co., hereunto annexed, is to form part of this case.

The question for the opinion of the Court is—

Whether the plaintiffs are entitled to recover in this cause, in respect of the aforesaid matters, out of the proceeds of the said vessel before the said sum of 5000 dollars is paid to the defendant.

If the Court shall be of opinion in the affirmative, then the Court is to pronounce for the claim of the plaintiffs with costs of suit, it being referred to the registrar and merchants

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to ascertain what sum is due to the plaintiffs in respect of the aforesaid matters.

If the Court shall be of opinion in the negative, then the plaintiffs' suit is to be dismissed with costs.

The following facts appeared from the printed evidence of C. H. M. Black, referred to in the 12th paragraph of the special case.

The 5000 dollars, for the repayment of which the instrument of mortgage of the 9th of March, 1867, was executed, was advanced by Black Brothers & Co., for rigging, sails, anchors, and chains, supplied to the ship in Nova Scotia, shortly before the date of the mortgage. George J. Troop was a member of the firm of Black Brothers & Co., and the mortgage was made to him on behalf of the firm. The ship, shortly after the date of the mortgage, left Nova Scotia, and Black Brothers & Co. next heard of her at New York, in the winter of 1867-1868. The mortgage money was then still unpaid, and the ship was in need of repair. Black, Brothers, & Co. did not arrest the ship, but made a further advance for such repairs as were necessary to enable the ship to proceed on a voyage to England. This they did because the ship, being a British vessel, could not be sold at an American port except at a sacrifice; and to avoid a loss, it was necessary that the ship should earn freight. Black Brothers & Co. expected a remittance to be made to them by the master of the ship, on the arrival of the ship in England, out of the freight; they took no assignment of the freight, but trusted to the master. The ship performed her voyage to England in safety; but Black Brothers & Co. received no remittance. On the 16th of July, 1868, Black Brothers & Co. having heard that the ship was loading, at a port in Mexico, a cargo destined for London, wrote to Cannon & Co., of Liverpool, a letter, the substance of which was as follows:—

"Halifax, N.S., 16th July, 1868.

"Dear Sirs,—We have now to enclose mortgage on the brigantine *Two Ellens*, to enable you to compel a good payment on the arrival of that vessel in an English port.

"You will please take charge of this vessel on her arrival, and insist upon a payment of at *least* 300*l.* or 400*l.* sterling. She has not yet made us a single payment, and her earnings are going elsewhere.

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"Should you find the inward freight anticipated, and the captain is not in a position to make payment as above, you will detain the vessel until the owners on this side can make some arrangement. We presume you will have no difficulty in detaining the balance of inward freight, particularly as the captain is part owner."

The mortgage mentioned in this letter is the instrument of mortgage mentioned in the 5th paragraph of the special case; it was sent with the letter to Cannon & Co. The instrument of transfer mentioned in the 7th paragraph of the special case was indorsed on the back of the instrument of mortgage. Cannon & Co. were the Liverpool agents of Black Brothers & Co. The defendant was a member of the firm of Cannon & Co., he was not a member of the firm of Black Brothers & Co. Mr. C. H. M. Black further stated that Black Brothers did not authorize the doing of the work or the furnishing of the supplies in respect of which the plaintiff sued, nor did the defendant to their knowledge.

The cause came on for hearing on the 2nd of February, 1871, and the defendant having in his answer pleaded that the ship did not need to be equipped or repaired, and that the claim of the plaintiffs was not a claim for necessaries within the true intent and meaning of the Admiralty Court Act, 1861, evidence was adduced upon this point on behalf of the plaintiff. Witnesses were called who stated that the ship was built in Nova Scotia of soft wood, that when she arrived at the port of London, in February, 1868, her bottom was wormed, and that in order to put her into a good seaworthy condition to carry a general cargo, it was necessary to have her caulked and sheathed, and to put in iron riders to strengthen her.

Cohen, for the plaintiffs. In order to establish a claim for necessaries within the meaning of the Admiralty Court Act, 1861, it is not requisite that the work done to the ship should be absolutely and unconditionally necessary. It is enough to shew that the work was necessary to render the ship seaworthy and fit to carry a general cargo: Williams and Bruce's Admiralty Practice, p. 159.

The defendant has no locus standi. He has no legal title to

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the ship, because the transfer of the mortgage to him was not registered; whatever interest he acquired by the transfer, he made over, before suit, to Cannon & Co. He has no equitable title, because he gave no consideration for the transfer of the mortgage.

The 5th section of the Admiralty Court Act, 1861, provides that the Court shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shewn to the satisfaction of the Court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales. The 35th section of the same Act provides that the jurisdiction conferred by the Act may be exercised, either by proceedings in rem, or by proceedings in personam. The action in rem conferred by this statute is founded upon a maritime lien, and the claim of the plaintiff is entitled to take precedence of the claim of a mortgagee. It is clear that, according to the general maritime law, material men have a maritime lien. Lord Tenterden and also Lord Mansfield were of that opinion: Abbott on Shipping, p. 108, 5th ed.). But until the passing of the recent statutes extending the jurisdiction of this Court, the municipal law of this country interfered to prevent the lien being enforced by legal process: *The Neptune* (1).

The recent statutes have removed this restriction of the municipal law. In *The Ella A. Clark* (2), it was held, that by virtue of 3 & 4 Vict. c. 65, a material man could, by process in this court, enforce a maritime lien against a foreign ship. There is no good reason why claims for necessaries falling within the 5th section of the Admiralty Court Act, 1861, should not be capable of being enforced in the same way. A maritime lien is the foundation of a proceeding in rem: *The Bold Buccleugh* (3); and the legislature, when it conferred jurisdiction upon this Court to enforce claims for necessaries by process in rem, must have intended to enable the Court to enforce the maritime lien conferred by the law maritime. Why should any distinction be drawn between the nature of the remedy conferred against a foreign ship, and the nature of the remedy conferred against a British ship? In the case of *The*

(1) 3 Hagg. Adm. 129; 3 Knapp, P. C. 94.
(2) Br. & L. 32; 32 L. J. (P. M. & A.) 211. (3) 7 Moo. P. C. 267.

Pacific (1), it was held by Dr. Lushington that a maritime lien could not be enforced in respect of a claim for necessaries falling within the 5th section of the Admiralty Court Act, 1861. The decision in *The Pacific* (1) was followed in *The Troubadour* (2). But it is submitted that *The Pacific* (1) and *The Troubadour* (2) are not consistent with the cases of *The Ella A. Clark* (3) and *The Skipwith* (4), and cannot be supported upon principle. *The Pacific* (1) seems to have been decided upon the ground that the jurisdiction conferred by the 5th section of the Admiralty Court Act, 1861, could not extend to enable the Court to enforce a maritime lien, because the jurisdiction was made to depend upon the domicil of the owners of the ship at the time of the institution of the suit. It was assumed, in the judgment in *The Pacific* (1), that a right of action which may be suspended cannot be a right of action founded upon a maritime lien. But this assumption arises out of a confusion between a maritime lien and a right to enforce a maritime lien. Dr. Lushington said, "A maritime lien accrues from the instant of the circumstances creating it, and not from the date of the intervention of the Court." But the lien, though it may accrue from the instant of the circumstances creating it, can only be carried into effect by the intervention of the Court, and the right of persons seeking to enforce the lien by legal process must often depend upon the circumstances existing at the date of the intervention of the Court; a person entitled to a maritime lien may lose the right to enforce the lien by laches: *The Europa* (5). There are many cases in which the right to enforce a maritime lien may be suspended. An alien could not, while his state was at war with England, avail himself of the process of our Courts to enforce a maritime lien, yet in such a case the suspension of the right to enforce the lien in this country would not take away the lien. Where money is borrowed upon bottomry, and bills of exchange are given as a collateral security, then the right to put the bond in suit is dependent upon the dishonour of the bills. Certainly the right to enforce a maritime lien may be regulated by the express provision of the legislature,

(1) Br. & L. 243; 33 L. J. (P. M. & A.) 120.

(2) Law Rep. 1 A. & E. 302.

(3) Br. & L. 32; 32 L. J. (P. M. & A.) 211.

(4) 2 Maritime Law Cases, 20; 10 Jur. (N.S.) 445.

(5) Br. & L. 89; 32 L. J. (P. M. & A.) 188.

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and the existence of a maritime lien for necessaries supplied to a British ship is consistent with the provision of the legislature, that the lien shall be enforced only in cases where the owners of the ship are not domiciled in England.

Even if no lien exists, the plaintiffs in this case are entitled to have their claim paid in preference to the claim of the defendant. The defendant has no interest in the ship, except as representing the original mortgagees, Black Brothers & Co. He cannot be placed in a better position than they would be placed in if they were the persons intervening. Black Brothers & Co. had the opportunity of enforcing their mortgage security against the ship at New York, if they had thought fit, but they considered it to be for their benefit that the ship should be sent to earn freight. The repairs done to the ship by the plaintiffs were ordered by the master, and were necessary to enable the ship to earn freight. After the repairs were done, Black Brothers & Co. by their agent, the defendant, took possession of the ship, and thereby ratified the act of the master, and took the advantage of the repairs. Qui sentit commodum sentire debet et onus: *Williams* v. *Allsup* (1); *Bristow* v. *Whitmore* (2).

Butt, Q.C., and *Clarkson*, for the defendant. The defendant has a perfect right to intervene in this suit. An unregistered transfer is valid as between transferor and transferee: see the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104, ss. 55, 57), *Stapleton* v. *Haymen* (3). The question in the case is not whether the defendant has a title such as would enable him to sue as plaintiff, but whether he has sufficient interest to entitle him to intervene. All persons having any interest in the property proceeded against have a right to intervene: *The Spirit of the Ocean* (4). If the plaintiffs meant to dispute the defendant's interest, they should have done so when he first intervened; they cannot do so now. It is against the bail given on behalf of the defendant that the plaintiffs are now proceeding.

There is no maritime lien in respect of the claims mentioned in the 4th and 5th sections of the Admiralty Court Act of 1861. Those

(1) 10 C. B. (N.S.) 417; 30 L. J. (C.P.) 353.
(2) 9 H. L. C. 391; 31 L. J. (Ch.) 467.
(3) 2 H. & C. 918; 33 L. J. (Ex.) 170.
(4) Br. & L. 336; 34 L. J. (P. M. & A. 74.

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two sections are in pari materiâ, and must be read in connection with the 11th section. Under the 4th section the Court has jurisdiction over a claim for the building, equipping, or repairing of a ship only in cases where, at the time of the institution of the cause, the ship is under arrest. Under the 11th section the Court has jurisdiction over any claim in respect of any mortgage duly registered. The claimant under the 4th section has no right, therefore, to institute a suit until the ship has been arrested at the instance of some other suitor. But a registered mortgagee under the 11th section may arrest the ship. Suppose a ship arrested at the suit of a registered mortgagee, is it to be said that a claimant under the 4th section, who had no right to sue until the mortgage suit was instituted, could, after the institution of that suit, come in and oust the claim of the mortgagee? Surely if the legislature had intended to confer upon a claimant under the 4th section a maritime lien, it would have conferred upon him an independent right of action. If the 4th section does not confer a maritime lien, it is impossible to hold that the 5th section does. But the words of the 5th section, taken by themselves, are sufficient to shew that it is not intended to confer a maritime lien. It is inconsistent with the idea of a maritime lien to make the right of suit depend upon the domicil of the owners of the ship at the time of the institution of the suit. A maritime lien cannot be suspended, and it is not capable of being treated like a springing use.

Williams v. *Allsup* (1) and *Bristow* v. *Whitmore* (2) do not apply. There is no evidence to shew that the defendant, or Black Brothers & Co., authorized or ratified the supply of necessaries. The master of the ship did not act as their agent: *The Troubadour.* (3)

Cohen, in reply.

Cur. adv. vult.

Feb. 15. SIR ROBERT PHILLIMORE. This is a cause instituted by certain shipbuilders at Millwall to recover a debt of 305*l.* 3*s.* and interest, on account of necessaries supplied by them to a vessel called the *Two Ellens,* which belonged to the port of Digby, in Nova Scotia, and of which no owner or part-owner was,

(1) 10 C. B. (N.S.) 417; 30 L. J. (C.P.) 353.

(2) 9 H. L. C. 391; 31 L. J. (Ch.) 467.

(3) Law Rep. 1 A. & E. 302.

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at the time of the institution of this suit, domiciled in England or Wales.

The defendant is a transferee of a registered mortgage from the owners. The facts are to be derived partly from a special case agreed upon by the parties, in which the averments are to be taken as admitted, and partly from evidence received upon certain disputed points. I am satisfied that the articles supplied and the repairs effected do fall under the category of necessaries, which was the principal matter upon which evidence was taken.

The owners, on the 9th of March, 1867, mortgaged their sixty-four sixty-fourth shares to George John Troop, a member of the firm of Black Brothers & Co., of Halifax, Nova Scotia, for securing the repayment of 5000 dollars advanced by that firm to the said owners, together with interest thereon. This mortgage was duly registered.

In February, 1868, the necessaries were supplied by the plaintiffs to the vessel in the port of London. On the 16th of July in the same year George John Troop transferred to the present defendant, John Alexander Black, who is not, however, a member of the firm of Black Brothers & Co., this mortgage for the alleged consideration of 5000 dollars, but no money was, in fact, ever paid by the defendant to Troop, and the transfer was only made to enable the defendant to take charge of the vessel in trust for and on behalf of the firm of Black Brothers & Co. This transfer was never registered, and the plaintiffs did not know, and were never informed, that the vessel was mortgaged. The proceeds of the vessel are insufficient to satisfy the claims of the plaintiffs and defendant, and the question for the decision of the Court is, whether the plaintiffs are entitled to recover whatever sum the registrar and merchants may find to be due to them out of the proceeds of the vessel before the sum of 5000 dollars is paid to the defendant; in other words, which of the two parties has the prior lien upon these proceeds.

On the part of the plaintiffs the first proposition contended for was, that the defendant had no locus standi either on legal or equitable grounds: not on legal grounds, because the transfer had not been registered according to the provisions of the Merchant Shipping Act, and yet the mortgagee had divested himself by the

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transfer of his legal title; and not on equitable grounds, because the register, in its present condition, did not present a faithful account, no mention being made of a transfer of the mortgage, and because no valuable consideration was given for the transfer. But to this it was replied that the title to the ship passed by the execution of a bill of sale, and not by the registration, whatever consequences might flow from the neglect of the purchaser to register, and the Court was referred to ss. 55 and 57 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), and to the case of *Stapleton* v. *Haymen* (1), in which it was distinctly laid down by the Court of Exchequer, in 1864, that the property in a ship passes, as between the vendor and the vendee, by a bill of sale, although the transfer be not registered pursuant to the Merchant Shipping Act, 1854. Moreover, I must consider that the practice of the Court has been, especially of late years, to be liberal in admitting parties who can shew any interest whatever in a suit, and the evidence in this case shews that the defendant is the agent of the original mortgagees.

Upon all these grounds I am of opinion that the defendant has a locus standi before the Court; and I proceed to consider the next and principal question, namely, whether, as the law now stands, the material man has a maritime lien upon the ship, and therefore, on the principle usually applied to liens of this description, a priority over the lien of the mortgagee.

The law previous to the passing of the Admiralty Jurisdiction Statutes is set out in the case of *The Neptune* (2), by which it was decided that the Admiralty Court had ceased to have jurisdiction over the claims of material men, differing in this respect from the general law of commercial countries, which, founded upon the Roman law, gave to material men a lien on the ship enforceable in Courts of Admiralty. The 3 & 4 Vict. c. 65, however, by s. 6, enacted that this Court should have jurisdiction to decide all claims and demands for necessaries supplied to any foreign ship or sea-going vessel. This statute was passed in 1840, and in 1863 my predecessor decided, after hearing a very elaborate argument, and correcting a previous judgment of his in *The Alexander* (3),

(1) 2 H. & C. 918; 33 L. J. (Ex.) 170.
(2) 3 Knapp, P. C. 94.
(3) 1 Wm. Rob. 288, 294.

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that this section conferred upon claimants under it a maritime lien: *The Ella A. Clark.* (1) This judgment, it will be seen, referred only to foreign ships. In 1861 the Admiralty Court Act, 1861 (24 Vict. c. 10), was passed, s. 5 providing that this Court shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shewn to the satisfaction of the Court that at the time of the institution of the cause any owner or part-owner of the ship is domiciled in England or Wales.

The decision in *The Ella A. Clark* (1), though it turned principally upon the construction of the 3 & 4 Vict. c. 65, was given, after consideration of 24 Vict. c. 10, and in the course of the judgment the learned judge said (2): "Looking through the several recent statutes, I am led to the general conclusion that when the legislature has appointed the proceeding in rem they intended to give the same remedy as heretofore was in use in this court in the administration of justice in cases of maritime lien, though no express words may be used to that effect."

Nevertheless, in 1864, Dr. Lushington ruled, in a considered judgment, that a material man claiming under the Admiralty Court Act, 1861 (24 Vict. c. 10)—that is, in the case of a ship not a foreign ship—had not a maritime lien, but only a right of action in rem, which gave no lien upon the ship "until the time of the institution of the cause:" *The Pacific.* (3) In this case Dr. Lushington held that the mortgagee was entitled to be paid in preference to the material man who supplied the materials after the date of the mortgage. This case seems to have overruled the previous case of *The Skipwith.* (4) To this judgment the learned judge adhered in the subsequent case of *The Troubadour* (5), in 1866.

I think I am bound to say that I am unable to acquiesce with the reasoning upon which the judgment in *The Pacific* (3) was founded, or to reconcile that reasoning with the judgment in *The Ella A. Clark.* (1) The two statutes ought, I should have ven-

(1) Br. & L. 32; 32 L. J. (P. M. & A.) 211.
(2) Br. & L. p. 36.
(3) Br. & L. 243; 33 L. J. (P. M. & A.) 120.
(4) 2 Maritime Law Cases, 20; 10 Jur. (N.S.) 445.
(5) Law Rep. 1 A. & E. 302.

tured to think, to have been construed as being in pari materiâ, and the argument which gave the maritime lien in the case of the foreign ship ought to have given the same privilege in the case of the British ship.

In *The Bold Buccleugh* (1), a case which is supported by the judgment in *The Europa* (2), the Privy Council said (3): "Having its origin in this rule of the civil law, a maritime lien is well defined by Lord Tenterden to mean a claim or privilege upon a thing to be carried into effect by legal process; and Mr. Justice Story (4) explains that process to be a proceeding in rem, and adds, that wherever a lien or claim is given upon the thing, then the Admiralty enforces it by a proceeding in rem, and, indeed, is the only Court competent to enforce it. A maritime lien is the foundation of a proceeding in rem, a process to make perfect a right inchoate from the moment the lien attaches; and, whilst it must be admitted that where such a lien exists a proceeding in rem may be had, it will be found to be equally true that in all cases where a proceeding in rem is the proper course, there a maritime lien exists which gives a privilege or claim upon the thing to be carried into effect by legal process. This claim or privilege travels with the thing into whatsoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and, when carried into effect by legal process by a proceeding in rem, relates back to the period when it first attached."

The proceedings in this case of the material men are proceedings in rem, and the language already cited from *The Ella A. Clark* (5) seems to me as applicable to their claim in the case of a British as of a foreign ship; and I should have thought that in such a case the maritime lien was inchoate before the institution of the suit, though the power of enforcing it would depend upon the fact of the owner not being domiciled in England or Wales at that time.

But I do not think that it would be right or proper, having regard to the usage which prevails in our courts of justice on this subject, to reverse the careful and deliberate judgment of my predecessor, even if he were a less distinguished judge than Dr. Lushington.

(1) 7 Moo. P. C. 267.
(2) Br. & L. 89; 32 L. J. (P. M. & A.) 188.
(3) 7 Moo. P. C. 284.
(4) 1 Sumner, 78.
(5) Br. & L. 32; 32 (P. M. & A.) 211.

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Only one other point remains for consideration, namely, whether there are any special circumstances proved in this case which would take it out of the application of *The Pacific* (1).

I have been referred to two cases, one of them, *Williams* v. *Allsup* (2), decided in 1861 in the Court of Common Pleas, the marginal note of which, in the 'Law Journal,' appears to me to be correct, and it is as follows:—"The plaintiffs, mortgagees of a ship, having permitted the mortgagor to remain in possession for upwards of four years, and during that time to use and navigate the ship for his own profit, the latter, without the knowledge of the plaintiffs, delivered her to the defendant, a shipwright, for the purpose of having reasonable and necessary repairs done to her, which the defendant did; the plaintiffs having demanded possession of the defendant, the latter refused to deliver her up until the bill for his repairs was paid:—Held, that the plaintiffs must be taken to have impliedly authorized the mortgagor to keep the vessel in an efficient state, and for that purpose to order necessary repairs to be done upon the ordinary terms, one of which was that the shipwright should have his lien upon the ship for the repairs. Held also, that s. 70 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), which enacts 'that the mortgagor shall not be deemed to have ceased to be owner of the mortgaged ship, except in so far as may be necessary for making such ship available as a security for the mortgage debt,' did not conflict with this view." Mr. Justice Willes said (3): "The mortgagor is permitted by the mortgagees to remain in possession of the vessel for the purpose of using it in the ordinary way, and he cannot use it in the ordinary way unless it is repaired. That seems to me to involve the permission of the mortgagees to get the vessel repaired upon the ordinary terms, though not to pledge the mortgagees' credit. Then the shipwright who does the repairs is entitled to his lien as incidental to his employment."

These expressions were strongly pressed by counsel upon my attention, but, upon examination of the case, the decision only amounts to this, that the material man, having a possessory common law lien upon the res, which he had repaired, was justified in

(1) Br. & L. 243; 33 L. J. (P.M. & A.) 120.

(2) 10 C. B. (N.S.) 417; 30 L. J. (C.P.) 353.

(3) 30 L. J. (C.P.) 355.

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retaining it until his debt was paid; and that this lien was not taken away by the Merchant Shipping Act, 1854.

The next case was decided also in the year 1861 by the House of Lords, *Bristow* v. *Whitmore*. (1) The marginal note is as follows:—"The master of a vessel at the Mauritius, in April, entered into a charterparty, under seal (therein describing himself commander and owner), with the commissariat officer there, for the conveyance of troops to Gravesend, and paid certain moneys and incurred liabilities for fitting up the vessel for the purpose. In the following month he entered into another charterparty, not under seal, at the Cape of Good Hope, for the conveyance of other troops, and thereupon paid further sums and incurred further liabilities to enable him to perform the contract. The owner became bankrupt, having previously mortgaged the vessel. Upon its arrival in the Thames the mortgagees seized it. The master filed a bill against the owner's assignees, praying a declaration that he was entitled to be repaid and indemnified out of the fund due from the Admiralty on account of the freight. The Commissioners of the Admiralty paid the amount into court. Held, reversing the decision of the Lord Chancellor, and restoring that of Vice-Chancellor Wood, that the master was entitled to be reimbursed out of the fund."

In this case Lord Kingsdown observed (2): "That there did not appear on the general rules of law to be much difficulty. A master of a ship had not a lien on freight for advances made by him on account of the ship; but if a trustee incurred expenses in the discharge of a trust he was entitled to retain them out of the trust property. So if an agent made a contract, the principal could not both approbate and reprobate it. The contract here was primâ facie unwarranted by the master's general authority; the owner (or mortgagee) adopted it, and now insisted on receiving all the benefit, leaving the agent to pay the expenses incurred in carrying it into effect, and acquiring the money earned by it."

It was strongly contended that I ought to apply the principles here stated to the case before me, and to hold that the mortgagees or their transferee could not approbate and reprobate the implied contract of the material man—could not avail themselves of the

(1) 9 H. L. C. 391; 31 L. J. (Ch.) 467. (2) 31 L. J. (Ch.) 470.

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repairs which he had effected, by which they were enabled to navigate the ship and to improve the security of their mortgage, without discharging the debt incurred by these repairs, as allowing him a lien upon the repaired res.

I confess that I should not have been sorry to apply the principle of this decision to the case before me, because I think the plaintiffs have been badly treated; but I am unable to do so. That judgment related to freight which was acquired in consequence of the unauthorized alterations made by the master of the ship, which freight the owner or the mortgagee claimed to receive while refusing to pay for the expense of the alterations, and I must remember that it is expressly provided by the Merchant Shipping Act, 1854, that the mortgagee is not to be considered in the legal category of owner (s. 70); and the evidence before me does not sustain the position either that the mortgagee was aware that those repairs were supplied by the material man upon the credit of the ship and not on the personal credit of the owner, or that the mortgagee stood by and looked on, giving directly or indirectly any sanction to the supply of these necessaries on the credit of the ship; and, according to the decision in *The Troubadour* (1), the mortgagee would not be liable for necessaries supplied to the ship, unless the master, in ordering the necessaries, was acting as the agent of the mortgagee.

I am therefore brought back to the consideration of the character of the lien conferred by the statute upon the material man, and I find, as I have said, the judgment of my predecessor deciding that the material man has not a maritime lien, and therefore, in this case, has not a claim entitled to priority over that of the mortgagees or transferee of the mortgage. I have ventured to state my doubts as to the grounds upon which those judgments are founded, but I must await their revision and alteration, if they are to be altered, by the appellate tribunal.

I must dismiss this suit with costs.

Solicitors for plaintiffs: *Westall & Roberts.*

Proctors for defendant: *Dyke & Stokes.*

(1) Law Rep. 1 A. & E. 302.

ASTERLEY AND OTHERS *v.* ADAMS. 1871

Letters of Request—Amendment of Rate—5 Geo. 4, c. 36. *Feb. 23.*

On the 29th of March, 1869, a rate was made by the churchwardens and overseers of the parish of E., in the diocese of Lichfield, for the repayment of money borrowed from the Public Works Loan Commissioners, under the provisions of 5 Geo. 4, c. 36. The defendant occupied a messuage and premises in the parish, in respect of which he was assessed, for the purposes of the rate, at the sum of 10*s.* 9*d.*; he refused to pay this sum, and disputed the validity of the rate. Letters of request were granted by the chancellor of the Bishop of Lichfield, directed to the judge of the Court of Arches, requesting the judge to call the defendant before him to answer "in respect of the said assessment."

A decree by letters of request was issued on the 29th of April, 1870, and the suit proceeded in the Arches Court. The defendant pleaded that a tithe rent-charge, the property of and received by the rector of the parish in commutation of certain tithes within the parish, was not assessed to the rate, and that a glebe house and lands within the parish, of which the rector was the owner and occupier, had been omitted from the assessment. The plaintiffs filed a responsive allegation, in which it was alleged that, in January, 1871, a meeting was duly held to amend the rate and the assessment on which the rate was made; and at the meeting the churchwardens of the parish, with the concurrence of the overseers, amended the assessment by adding to and including in such assessment the rectorial tithes, and glebe house and lands, and amended the rate by reducing the assessment on all the rateable property, and assessed the rector as owner of the tithes, and as owner and occupier of the glebe house and lands, and that the sum —in respect of which the defendant was assessed in the amended rate and assessment—amounted to 9*s.* 5*d.* instead of 10*s.* 9*d.*, and that the plaintiffs only claimed to recover the sum of 9*s.* 5*d.*

The defendant opposed the admission of the responsive allegation, and the Court held that the responsive allegation was inadmissible, because the Court had no jurisdiction to inquire concerning any other assessment than that mentioned in the letters of request.

THIS was a case brought by letters of request, from the chancellor of the diocese of Lichfield, by Richard Asterley, Edward Hodges, Richard Henry Hammonds, and Charles Barber, the churchwardens and overseers of the parish of Edgmond, in the said diocese, against Thomas Harper Adams. The following is the material part of the letters of request:—

Whereas Richard Asterley and Edward Hodges, as churchwardens of the parish of Edgmond, in the county of Salop, and diocese of Lichfield, and province of Canterbury, and Richard Henry Hammonds and Charles Barber, as overseers of the poor of the said parish, do intend to commence a suit against Thomas Harper Adams, Esq., also of the said parish, in a cause of subtraction of church-

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rate for the non-payment of the sum of 10*s.* 9*d.*, being the sum to which he was assessed under a church-rate duly made by the said churchwardens and overseers of the said parish upon the inhabitants and parishioners of the said parish, in respect of rateable property in the said parish, on the 29th of March, 1869, for the purpose of repaying the first instalment of a loan of 600*l.*, with interest thereon, which was borrowed by them of the Public Works Loan Commissioners, under and by virtue of and in compliance with the provisions of 5 Geo. 4, c. 36, on the 12th of June, 1868, for the purpose of repairing and reinstating the parish church of Edgmond aforesaid. And whereas the said Thomas Harper Adams having refused to pay the said assessment of 10*s.* 9*d.*, and on being summoned by the said churchwardens and overseers before two justices of the peace for the non-payment of the same, objected to the jurisdiction of the said justices on the ground that he disputed the validity of the said rate, and the summons was thereupon dismissed; and, whereas the said churchwardens and overseers for the poor of the said parish of Edgmond aforesaid have requested me the Worshipful James Thomas Law, Master of Arts, Vicar-General of the Right Reverend Lord Bishop of Lichfield, to grant them letters of request that they may commence the said suit in the Arches Court of Canterbury; and, whereas the commencing the said cause in the Court of Arches will be of advantage to all the parties therein, not only for the better assistance they can there have of advocates and proctors in the cause in which points of law may be raised than in the Consistorial Court of Lichfield, but as the same will be also a more ready and expeditious way of hearing and fully determining the said cause; these are therefore at the desire of the said Richard Asterley, Edward Hodges, Richard Henry Hammonds, and Charles Barber; and I do hereby request the Right Honourable Sir Robert Phillimore, Knight, Doctor of Laws, Official Principal of the Arches Court of Canterbury, lawfully constituted, to call the said Thomas Harper Adams to appear before him or his surrogate, or any other competent judge in this behalf, to answer to the said Richard Asterley, Edward Hodges, Richard Henry Hammonds, and Charles Barber, in a cause of subtraction of church-rate in respect of the said assessment, which he has refused to pay, and to hear and to finally determine the said cause according to law.

The judge of the Arches Court accepted the letters of request, and on the 29th of April, 1870, a decree by letters of request was issued, which was served upon the defendant. The decree by letters of request recited the letters of request, and cited the defendant to answer to the said Richard Asterley and others, "as in the said letters of request are more particularly described in the said cause of subtraction of church-rate."

The plaintiffs filed a libel on the 14th of May, 1870. The libel stated in substance, as follows:—

1. That the parish church of Edgmund being, in 1868, in a state requiring repairing and reinstating, a vestry meeting of the inhabitants and occupiers assessed to the relief of the poor, was in pursuance of that notice held on Monday the 27th day of April, 1868, in the vestry room of the said parish, for the purpose of determining upon the sums of money requisite for the purpose of

repairing and reinstating the said church, and also for the purpose of taking into consideration and determining upon the propriety of authorizing the churchwardens and overseers of the poor of the said parish to make application to the commissioners authorized and empowered to make advances for public works under the provisions of 5 Geo. 4, c. 36, and the Acts therein recited or referred to, or subsequently passed, for amending, continuing, or extending the same for a loan of a sum of money for the purpose of repairing and reinstating the said church.

2. That at the said meeting of the vestry it was resolved and determined that the sum of money which was requisite for the purpose of repairing and reinstating the said church, amounted to 1986*l.* 10*s.*, and that the churchwardens and overseers of the poor should, with the consent of the bishop of the diocese, and the incumbent of the said parish, make application to the said commissioners for a loan of the sum of 600*l.*

3. That after the said resolution was carried, the said churchwardens and overseers of the poor of the said parish, with the consent in writing of the bishop of the diocese and the incumbent of the parish, made application to the said commissioners for a loan of 600*l.*, being part of the sum required for defraying the expense of repairing and reinstating the said church; and the said commissioners thereupon advanced and paid to the said churchwardens and overseers the sum of 600*l.* as a loan or advance for the purpose of defraying part of the expenses of repairing and reinstating the said church, upon the security of the rates of the said parish, and that the said churchwardens and overseers duly assigned to the secretary of the said commissioners the rates to be made under the said Act, as a security for the repayment of the said sum so advanced, with interest at the rate of 4 per cent. per annum, by annual instalments on the amount of the proposed money advanced within the period of twenty years.

4. That on the 29th day of March, 1869, the churchwardens and overseers of the poor of the said parish duly made a rate or assessment of twopence in the pound on all rateable properties in the said parish, on all the inhabitants of the said parish, and others rateable in respect of the said loan, for the payment of the first annual instalment of the proposed sum, with one year's interest on the said loan due on the 13th day of June, 1869.

5. That prior to and at the time of the making of the said rate, the said Thomas Harper Adams, the defendant in this cause, did, as he now does, occupy, possess, or enjoy a messuage or tenement and premises described in the said rate, situate in the said parish of Edgmond, for and in respect of which he was rightly and equally rated and assessed in the rate aforesaid, at the sum of 10*s.* 9*d.*

7. That the said Thomas Harper Adams hath been several times requested to pay the said sum of 10*s.* 9*d.*, so rated and assessed upon him as aforesaid, but hath refused or neglected to pay the same; and that on the 5th day of April, 1870, the said Thomas H. Adams was summoned before two of her Majesty's justices of the peace for the county of Salop, and for the district wherein the said parish of Edgmond is situate, for non-payment of the same, and that he then stated by his solicitor that he disputed the legality of the said rate, in consequence whereof the said magistrates declined to proceed for the recovery of the said rate or assessment.

The libel contained other formal allegations, and concluded with

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a prayer that upon legal proof of the premises, the said Thomas Harper Adams might be adjudged to pay the said sum of 10*s.* 9*d.*, and be condemned in costs.

On the 7th of July, 1870, an allegation was filed on behalf of the defendant. The allegation traversed most of the statements contained in the libel. To this allegation of the defendant, the plaintiffs, on the 25th of July, filed a responsive allegation. On the 4th of November, 1870, a second allegation was filed on behalf of the defendant, and on the 19th November, 1870, the plaintiffs filed an additional allegation in reply to the defendant's second allegation.

On the 6th December, 1870, defendant's proctors filed notice that the defendant did not intend to give in any further plea.

On the 13th of January, 1871, *Sir Travers Twiss, Q.A.*, and *Pritchard*, on behalf of the defendant, moved the Court to rescind the conclusion of the cause, and to allow the defendant to give in an additional allegation. They stated that the recent decision of the Judicial Committee of the Privy Council in the case of *Smallbones* v. *Edney* (1), so interpreted the law, as to establish the invalidity of the rate in the present case, and that facts which, before the decision of the Judicial Committee in *Smallbones* v. *Edney*, were believed to be immaterial and did not appear upon the pleadings, were now found to be material. The additional facts upon which the defendant relied were stated in an affidavit filed in support of the motion.

Dr. Tristram opposed the motion.

SIR ROBERT PHILLIMORE rescinded the conclusion of the cause, and allowed the defendant to give in an additional allegation pleading the facts set forth in the affidavit filed in support of the motion.

The defendant, accordingly, on the 13th of January, 1871, filed an additional allegation.

The first article of this additional allegation stated that the said sum of 600*l.*, part of the said sum of 1986*l.* 10*s.*, was raised for the purpose of restoring and repairing the chancel as well as

(1) Law Rep. 3 P. C. 444.

the body of the said church. Other of the articles of the said additional allegation were as follows:—

8. That a tithe rent-charge, arising out of the said parish of Edgmond, and amounting to the sum of 1200*l.* 6*s.* 6*d.*, or thereabouts, the property of, and received by, the Rev. C. F. C. Pigott, the rector of the said parish, in commutation of certain tithes within the said parish, was not rated and assessed to the said pretended rate alleged to have been made on the 29th day of March, 1869, as under the circumstances hereinbefore alleged it ought by law to have been.

9. That the said C. F. C. Pigott is, as rector of the said parish of Edgmond, the owner and occupier of a certain mansion house and glebe lands within the said parish, of the rateable value of 136*l.* 5*s.* per annum, and that the said mansion house and glebe lands ought by law to have been rated and assessed towards the said pretended rate, but that they have been omitted therefrom.

On the 1st of February, 1871, the plaintiffs' proctors, by way of reply to the said additional allegation, alleged in substance as follows:—

1. The whole of the said sum of 600*l.* was raised exclusively for the purpose of repairing and restoring the body of the said church, and that as the rectorial tithes, and glebe house and lands, in the said parish were supposed by the vestry of the said parish at the meeting referred to in the second article of the libel, to be by law exempt from assessment to the rates to be thereafter made for the repayment of the said loan, the said Rev. C. F. C. Pigott, as rector of the said parish, offered and agreed with the said churchwardens and vestry of the said parish to provide funds sufficient to pay for all the expenses to be incurred in respect of repairing and restoring the said chancel or any part thereof, and for that purpose he undertook to subscribe a sum of 600*l.*, to be applied partly for the purpose of repairing and restoring the said chancel of the said church, and such sum being more than sufficient for the expense of the repairs and restoration of the said chancel, the surplus was to be applied towards repairing and restoring the body of the said church. That on the application being made by the said churchwardens and overseers of the said parish to the Commissioners of Public Works for the loan of 600*l.*, for the repairs of the said church, the commissioners agreed to advance, and did in fact advance, the said sum of 600*l.*, for the purposes of the repairing and the restoring the said church, expressly excepting from such purposes the repairs and restoration of the said chancel.

2. The plaintiffs admit that the tithe rent-charge arising out of the said parish of Edgmond, and amounting to the gross estimated sum of 1200*l.* 6*s.* 6*d.*, or thereabouts, the property of, and received by, the Rev. C. F. C. Pigott, the rector of the said parish in commutation of certain tithes within the said parish was not rated and assessed to the said rate made on the 29th day of March, 1869, as in the eighth additional article alleged; and further they admit that the said Rev. C. F. C. Pigott is, as rector of the said parish of Edgmond, the owner and occupier of a certain mansion house and glebe lands within the said parish, of the gross estimated value of 136*l.* 5*s.* per annum, which were omitted from the said rate, as alleged in the said ninth additional article of the said allegation. But the proctors for the plaintiffs allege that at the time of

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the making of the said original rate it was supposed by the said vestry and by the said plaintiffs, as well as by the defendant (there being at that time no legal decision contrary thereto), that the said rectorial tithes and glebe house and lands were exempt by law from being assessed for the repayment of the said loan, as was well known to the defendant, the legality of such exemption being in effect admitted by the allegation originally filed by the defendant in this cause. And the proctors for the plaintiffs further allege that in consequence of, and for the purpose of giving effect to a decision of the Judicial Committee of Her Majesty's Privy Council, delivered on the 10th day of December, 1870, in the case of *Smallbones* v. *Edney and Lunn*, by which decision it was in effect declared that by law all tithes, glebe houses, and glebe lands, are liable to be assessed to rates made for the repayment of money borrowed under 5 Geo. 4, c. 36, for repairing and restoring churches, the plaintiffs, who were the churchwardens of the said parish at the time of the making of the said rate, and have ever since continued and still are the churchwardens, summoned the overseers of the said parish by a notice in writing to attend a meeting to be held in the month of January, 1871, for the purpose of amending rates made on the said 29th day of March, 1869, and the assessment on which the same were made, so as to bring the same in conformity with the said decision of the said Judicial Committee of Her Majesty's Privy Council, giving the said overseers notice of the purpose for which the said meeting was to be held. That John Harper, one of the said overseers, attended the said meeting, and that the other overseer did not attend, but made an objection thereto, that the said plaintiffs, as the churchwardens of the said parish, and the said John Harper, as overseer of the said parish, thereupon, with the concurrence of George Stokes and Ann Wiggin, who were present at the said meeting, the overseers of the said parish, at the time of the making of the said rate, proceeded for the purpose of giving effect to the said judgment of the Judicial Committee of Her Majesty's Privy Council, to amend the assessment upon which the said rate on the 29th day of March, 1869, was made by adding to and including in such assessment the said rectorial tithes and glebe house and lands of and in the said parish of Edgmond, the said rectorial tithes and glebe house and lands being estimated at the annual rateable value of 1216*l.* 5*s.* And the said proctors for the plaintiffs further allege, that the said plaintiffs, as such churchwardens as aforesaid, and the said John Harper, as such overseer as aforesaid, did then and there, also with the concurrence of the said George Stokes and Ann Wiggin, as overseers of the parish at the time of the making the said original rate, amend the said rate, by reducing the assessment on all the rateable property in the said parish from 2*d.* in the 1*l.* to 1¾*d.* in the 1*l.*, and did thereupon assess the said Rev. C. F. C. Pigott, as owner of the said tithes and owner and occupier of the said glebe house and lands, and that he did thereupon pay to the said plaintiffs the sum of 8*l.* 17*s.* 4*d.*, for and in respect of the rate due from him as rector of the said parish, for the payment of the instalment of the said loan with interest due in March, 1869. And the said proctors for the plaintiffs further allege that the sum at which the defendant is assessed in the said amended rate is 9*s.* 5*d.*, instead of 10*s.* 9*d.*, and that the claim made against the said defendant in this suit has been thereby reduced from 10*s.* 9*d.*, as claimed in the 5th article in the libel, to the sum of 9*s.* 5*d.*, of which reduction the defendant had due notice prior to the admission of the said additional articles of his said allegation. And the said proctors for the plaintiffs further allege, that the plaintiffs now only claim to recover from

the said defendant the sum of 9*s.* 5*d.*, as due from him in respect of the land held by him in the said parish of Edgmond, under the rate made on the 29th day of March, 1869, since amended as aforesaid.

The defendant's proctors gave due notice that the defendant opposed the admission of the plaintiff's allegation in reply to the additional allegation filed on behalf of the defendant.

Feb. 17, 1871. *Sir Travers Twiss, Q.A.*, and *Pritchard*, on behalf of the defendant, opposed the admission of the plaintiffs' said allegation.

The voluntary undertaking of the rector to contribute a sum of money towards the expenses is a fact wholly irrelevant to the question in the cause, and cannot affect the validity of the rate.

The jurisdiction of the Court is limited by the letters of request, and the Court cannot consider the validity of any rate or assessment, except the rate or assessment referred to in the letters of request. The Court cannot entertain any question respecting the validity of the amended rate: *White* v. *Beard* (1). The only question which can be raised in this suit is whether the defendant was justified in refusing to pay the sum mentioned in the letters of request.

Dr. Spinks, Q.C., and *Dr. Tristram* for the plaintiffs. The amended rate is not a new rate; it is the same rate, and the persons who have authority to make a rate in the first instance have authority to correct any mistake in the assessment. In *Hawes* v. *Pellatt* (2) an error had been made in the sum assessed, and Sir Herbert Jenner Fust allowed the libel to be reformed.

Sir Travers Twiss in reply.

Cur. adv. vult.

Feb. 23. SIR ROBERT PHILLIMORE. This is a case which relates to the admissibility of an allegation in a suit for the subtraction of a church-rate levied to repay money borrowed under the statute 5 Geo. 4, c. 36. The pleadings in this cause had been concluded when I was requested by the defendant to rescind the conclusion for the purpose of admitting an allegation setting forth that the

(1) 2 Curt. 480, 496.

(2) 2 Curt. 473.

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great tithes had not been rated in this case, a fact which, according to the recent decision of the Privy Council, in *Smallbones* v. *Edney* (1), rendered the rate invalid; this decision having been given since the conclusion of the formal pleadings in this suit. I admitted this allegation; and the present one purports to be responsive to it on the part of the plaintiff. The response is in substance: First, that the owner of the tithe rent-charge had agreed with the churchwardens to contribute a sum more than sufficient for the restoration of the chancel, though not rated; but this agreement was parol only, and never embodied in any formal shape, and I am of opinion that it cannot be pleaded as equivalent to the rating of the great tithes. Secondly, the remainder of the allegation is occupied with pleading that since the decision of the Privy Council the churchwardens have duly summoned the overseers according to the provisions of the statute, to a meeting for the purpose of amending the rate, which is the subject of the suit in this case, and that it was amended by assessing the owner of the tithes at the sum of 8*l.* 17*s.* 4*d.*, which he has since paid, and by reducing the assessment on all the rateable property in the parish from twopence to seven farthings in the pound, and by reducing the claim against the defendant in this suit from 10*s.* 9*d.*, claimed in the libel, to 9*s.* 5*d.*, which is the sum now sought to be recovered in this suit.

The Court has no original jurisdiction in this matter, but derives it from the letters of request. Those letters recite the former rate, that the defendant was required to pay the former sum, refused to do so, and was duly summoned before the magistrates, whose jurisdiction was ousted by his contesting the validity of the rate.

This is the case which the letters of request enable me to try, and I am of opinion that I cannot substitute for that the altered case which the allegation contains. The rate which it is now sought to recover the defendant has not refused to pay, nor had he been summoned before the magistrates with reference to it.

I was pressed with the case of *Hawes* v. *Pellatt* (2); but it is enough to say that the circumstances of that case were peculiar. The defendant had no counsel; and this particular point was never raised or decided. Moreover, I have caused the letters of request in that case to be laid before me; and I find that the amount of

(1) Law Rep. 3 P. C. 444. (2) 2 Curt. 473.

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the rate was not specified, but this Court was only requested to entertain a suit for a church-rate generally, so that the hands of this Court were not tied as they are in this instance. The case of *White* v. *Beard* (1), and others of the same kind, do not seem to me to apply to the present case.

I must reject this allegation; and give the costs of opposing it to the defendant.

Proctor for plaintiffs: *Brooks & Co.*

Proctors for defendant: *Pritchard & Sons.*

THE WAVERLEY.

April 19.

Salvage—Agreement to fix the Amount.

Where an agreement to fix the amount of the remuneration to be paid for salvage services has been deliberately entered into at the time of the commencement of the danger between perfectly competent parties, the Court will not allow the agreement to be set aside, merely because the execution of it has turned out more difficult than was anticipated, at the time of making the contract.

The circumstances under which such contracts may be set aside, considered.

THIS was a case of salvage, instituted on behalf of the owners, master, and crew of the screw steamship *London*, against the screw steamship *Waverley* and the cargo lately laden therein.

The *London* was a screw steamer, of 830 tons registered tonnage, propelled by engines of 120 horse-power, nominal; and manned by a crew of thirty-four hands all told. She was one of a line of steamers proceeding regularly between London and Cadiz and intermediate ports, with passengers and merchandise. On the 28th of January, 1871, in the prosecution of a homeward voyage from Cadiz, she arrived off Cape Sagres, and those on board her were signalled that a steamship was upon the coast to the south of Cape Espichel, without a propeller, and required to be towed to Lisbon. The *London* was steered in along shore towards Cape Espichel, and shortly after 5.30 A.M. on the 29th of January, came up with the *Waverley* about five miles from Cape Espichel. The *Waverley* was of 388 tons registered tonnage, and was laden with a cargo of tobacco. She had lost her propeller and was under

(1) 2 Curt. 494.

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sail, and had despatched her chief officer and some of her crew to Lisbon, to procure the assistance of a steam-vessel to tow her to that port.

What next took place, appears from the following articles of the plaintiffs' petition, which were admitted by the defendants in their answer.

7. The master of the *London* then asked if the *Waverley* required assistance, upon which somebody on board her offered 300*l.* for the *London* to tow her to Lisbon, which sum the master of the *London* declined to accept, but offered to tow the *Waverley* to Lisbon without an agreement. The master of the *London* then caused one of her life-boats to be lowered, and despatched her chief officer in it with a line to take a warp from the *Waverley*, and the master of the *London* gave directions to the said mate to ask the sum of 500*l.* for towing the *London* to Lisbon, in case he should find it necessary to enter into an agreement.

8. Upon the life-boat of the *London* getting alongside the *Waverley*, the master of the latter insisted upon an agreement being made as to the amount to be paid for the towage to Lisbon, as he had sent his chief officer to the shore three days previously for assistance. The mate of the *London* then asked 500*l.* for the towage of the *Waverley* by the *London* to Lisbon, upon which the master of the *Waverley* said he would split the difference between the 500*l.* then asked and the 300*l.* which he had offered, and give 400*l.*, to which proposal the mate of the *London* assented, and a line was then given to him with which to haul on board the *London* a hawser from the *Waverley*.

9. The life-boat of the *London* then returned to her, and by means of the aforesaid line a new 9-inch warp, belonging to the *Waverley*, was got from her on board the *London*, and was afterwards properly parcelled and secured, and the *London*, at about 8 A.M. of the said day, commenced towing the *Waverley* for Cascaes Bay, and the sails of the *Waverley* were then taken in. The wind at this time was about N.N.W. and moderate, but there was a very heavy cross sea running from N.N.E. and N.N.W.

10. The *London* then towed the *Waverley* for about an hour, by which time the wind had increased, and had come on to blow violently in squalls from N.N.W. and N.W., and the sea had become worse, and the hawser by which the *London* was towing the *Waverley* parted suddenly, and the head of the *Waverley* got across the sea, and she began driving rapidly to the S.E. The weather was then too boisterous to admit of a boat proceeding to the *Waverley* from the *London*, without great danger, and the master of the *London* then caused a life-buoy to be dropped over the stern of his vessel with a line attached to it, and the *London* then steamed round the *Waverley*, and swept her with the said line, and those on board the *Waverley* were then enabled to get the line on board her, and by means thereof the hawser of the *Waverley* was again got on board the *London*, and such hawser was then secured between her and the *Waverley*, and at about 10.30 A.M., the *London* again commenced to tow the *Waverley*; but almost as soon as this warp had been straightened, it again parted, and the *Waverley* continued driving to the S.E.

11. The *London* again steamed round the *Waverley*, and by means of a life-

buoy, the *Waverley* was again swept, and a rope was again got on board her, and by means thereof, at about 1 P.M., the *London* succeeded in getting fast to the *Waverley* by two hawsers, one belonging to the *Waverley* and the other belonging to the *London*.

12. The *London* then began towing the *Waverley* by the said two hawsers, at about half speed, and continued doing so until 1.30 P.M., when the wind being very heavy and the sea running very high, the hawser belonging to the *London*, and by which she was towing the *Waverley*, parted. The *London* then attempted to drift a line to the *Waverley*, for the purpose of again getting on board the said hawser; but at about 2 P.M., whilst this was being done, the second hawser by which the *London* was towing the *Waverley*, also parted, and the *Waverley* again got across the sea, and began driving to the S.E. The *London* then went round the *Waverley*, and swept her again, and got both hawsers fast to her, and at about 3.30 P.M. the *London* again began towing the *Waverley*, and continued doing so for about half an hour, when the rope of the *London* again parted. The *London* then continued towing the *Waverley* by one hawser until 4.30 P.M., when that also parted, and the *Waverley* again got across the sea and commenced driving towards the shore, from which she and the *London* were then distant only between three and four miles.

13. It was at this time getting dark, and it being impossible for the *London* to again get fast to the *Waverley* before dark, and useless for her to do so in the then state of the wind and weather, as the ropes would have again parted, the *London* steamed to the *Waverley*, and her master advised those on board the *Waverley* to let go their anchors and pay out their cables to their ends, with a view to preventing her from driving ashore and being lost; and the master of the *London* offered to take the master and crew of the *Waverley* on board the *London*, and to keep the *London* by the *Waverley* during the night.

The anchors of the *Waverley* were then both let go and her chains were paid out to the ends, and this having been done the master and the rest of the crew of the *Waverley* left her and went on board the *London;* the wind at this time was blowing very heavily in squalls from the N.W., and there was a heavy sea running. The *London*, with the master and crew of the *Waverley* on board her, was kept under steam during the night near the *Waverley*, and until 6 A.M. of the following day, when the master and crew of the *Waverley* and the chief officer and carpenter of the *London* went on board the *Waverley*. It was alleged in the 16th article of the plaintiff's petition that at this time before they went on board the *Waverley*, "the master of the *London* informed the master of the *Waverley* that he considered the aforesaid agreement, which had been entered into by the mate of the *London* on the preceding day, for the towage of the *Waverley* by the *London* for 400*l.* to be at an end, and in this the master of the *Waverley* acquiesced."

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The *London* was then again secured to the *Waverley*, and an attempt was made to get in her starboard cable, but only a portion of such cable could be got in, and at about 7.15 A.M. the remainder of the said cable was slipped from and lost, and her port cable was cut and also lost. The *London* then towed the *Waverley* out of the position which she then was in, and proceeded with her for Lisbon. The *London*, after experiencing considerable difficulty and danger, succeeded in towing the *Waverley* over the bar of the Tagus into safety, and afterwards to Lisbon, where the said vessels arrived at about 1.20 P.M. of the same day. Upon the arrival of the *London* with the *Waverley* at Lisbon, the *London* was, in consequence of her having received the crew of the *Waverley* on board her as aforesaid, placed in quarantine, and the passengers of the *London* had to be sent to the lazaretto, and the *London* was in consequence detained at Lisbon for the space of about two days longer than she otherwise would have been.

The following allegations in the plaintiffs' petition were admitted by the defendants:—

19. Before the *London* met with the *Waverley* as aforesaid, two steamships, called respectively the *Lusitana* and the *Rebocator*, had been despatched from Lisbon to render assistance to the *Waverley*, but such steamships had been compelled by the weather to return again to Lisbon without going to the *Waverley*.

20. Shortly after the *Waverley* had been got in safety to Lisbon the wind changed to W.S.W., and blew very heavily, and the sea broke with great violence upon the coast and on the bar of the Tagus, and had the *Waverley* then been at the place where she had anchored as aforesaid, or without assistance, she would have driven ashore, and been lost.

21. The *Waverley* and her cargo and the lives of her master and those of her crew who were on board her when she was fallen in with by the *London* were saved by the aforesaid services from being lost.

22. In rendering the said services the *London* ran considerable risk of being lost and of sustaining damage, through collision with the *Waverley* and otherwise, and the master and crew of the *London* incurred risk of life and of receiving personal injuries.

24. The master and crew of the *London*, whilst rendering the services aforesaid, underwent great labour and fatigue.

25. Whilst rendering the services aforesaid the life-boat of the *London* was much injured, and her port gangway ladder was smashed, and the owners of the *London* have sustained losses in consequence to the extent of 28*l.*

26. In rendering the services aforesaid the owners of the *London* have suffered an actual loss of 49*l.* 4*s.* by damage to hawsers and ropes used therein, and have to pay to the authorities at Lisbon the sum of 61*l.* 6*s.* 8*d.* for expenses of the *London*, caused by her having been placed in quarantine there in consequence of her having had the crew of the *Waverley* on board her.

27. The values of the *London*, her cargo, and freight at the time of the aforesaid salvage services were as follows; that is to say, the *London* was of the value of 18,000*l.*, her cargo 75,000*l.*, and her freight 1700*l.*

The answer, filed by the proctors for the owners of the *Waverley*, contained the following articles:—

3. They deny that the master of the *Waverley* acquiesced in the information given to him by the master of the *London*, as stated in Article 16. They further submit to the Court whether he could or not legally so acquiesce, and whether his acquiescence would or not have any legal effect in the circumstances.

9. They have paid into Court the sums of 400*l.* and 123*l.* 11*s.* 8*d.*, which they have tendered to the plaintiffs, the said sum of 400*l.* being the full amount of the sum contracted for on behalf of the *London*, and the sum of 123*l.* 11*s.* 8*d.*, being full remuneration for the expenses and damages incurred by the owners of the *London* in consequence of their having received the crew of the *Waverley* on board her, and the said sum of 123*l.* 11*s.* 8*d.* being made up of the two following items, to wit—61*l.* 6*s.* 8d. quarantine expenses, as pleaded in Article 26 of the petition, and 62*l.* 5*s.* being demurrage at the rate of 9*d.* per ton on the registered tonnage of the *London* for the space of two days, which is the detention pleaded in Article 18 of the petition. The said tenders have been rejected by the plaintiffs.

10. They submit that the agreement pleaded in the 8th article of the petition was and is a valid agreement, and that the same has never been rescinded.

The answer concluded with a prayer to the judge to pronounce for the said agreement and for the said tenders, and to condemn the plaintiffs in all the costs occasioned by their refusal of the said tenders.

It appeared from an affidavit as to value filed on behalf of the defendant, the owner of the *Waverley*, that the *Waverley* was of the value of 11,000*l.*; her cargo was of the value of 51,744*l.* It was stated in the affidavit that the gross freight payable upon the right delivery of the cargo would amount to 2940*l.*; that expenses would have to be incurred on the arrival of the ship in England, and prior to the delivery of the cargo, amounting to about 300*l.*, which expenses would not have had to be incurred had the ship been lost.

March 31. The case came on for hearing. The only important evidence which was adduced was with reference to the statement contained in the 16th article of the petition. The result of this evidence appears from the judgment.

Milward, Q.C., and *Clarkson*, for the plaintiffs. Under the circumstances the plaintiffs are entitled to a larger sum than the

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400*l.* stipulated for in the first instance. It is contended that the agreement was originally inequitable; but even if it was not, it was entered into with reference to the state of weather existing at the time, and supervening circumstances rendered it necessary for the plaintiffs to perform services which were not within the scope of the agreement: *The Minnehaha* (1); *The Annapolis* (2); *The I. C. Potter.* (3) The defendants, by tendering the sum of 123*l.* 11*s.* 8*d.* in addition to the sum of 400*l.*, have, in fact, admitted that the agreement is not binding. The facts stated in the 16th article of the petition shew that the agreement was rescinded, or at least that the master of the *Waverley* recognized the fact that the agreement was no longer binding. The master of the *Waverley*, who had authority to enter into the agreement, had authority to rescind it.

Butt, Q.C., and *W. G. F. Phillimore*, for the defendants. The agreement was entered into with a full knowledge of all the circumstances, and is binding upon the parties: *The Jonge Andries* (4); *The Helen and George* (5); *The Firefly* (6); *The Betsey* (7); *The Repulse.* (8) *The I. C. Potter* (3) is in the defendants' favour. That case establishes that the *London* was bound to stand by the *Waverley*. The *London* therefore did nothing she was not bound to do, and there was no consideration to support any promise to pay her more than the sum originally stipulated for. The master of the *Waverley* had no authority to acquiesce in the rescission of the contract. If he did so, he acted under duress.

Milward, in reply.

Cur. adv. vult.

April 19. SIR ROBERT PHILLIMORE. This is a cause of salvage instituted by a screw steamship, the *London*, against another vessel of the same kind, the *Waverley*. The value of the latter, with her cargo and freight, is 65,384*l.*; of the former, 94,700*l.*

The *Waverley* has made a tender composed of two sums—400*l.* as the alleged amount contracted for on behalf of the *London*, and 123*l.* 11*s.* 8*d.* as a full remuneration for expenses and damages

(1) Lush, 335; 14 Moo. P. C. 133.
(2) Lush, 355.
(3) Ante, p. 292.
(4) Swa. 226, 303; 11 Moo. P. C. 313.
(5) Swa. 368.
(6) Swa. 240.
(7) 2 Wm. Rob. 167.
(8) 2 Wm. Rob. 396.

incurred by her having received the crew of the *Waverley* on board of her. 1871

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The *London* was a powerful screw steamer of 830 tons, engines of 120 nominal horse-power, a crew of thirty-three hands and a master, bound from Cadiz to London, with passengers and merchandise. About 1 P.M. on the 28th of January in this year, on her arrival off Cape Sagres, she was informed that there was a steamship without a propeller near the coast to the south of Cape Espichel which required to be towed to Lisbon. The *London* proceeded in that direction, and found on the following day (the 29th), about five miles from Cape Espichel, the *Waverley* steamship, of 388 tons register, laden with tobacco. She was under sail, having lost her propeller. Her chief officer and some of her crew had gone to Lisbon to procure a steam-tug.

At the time when the *London* came up there was a very heavy sea, but the weather, which had been very boisterous, had moderated. The master of the *London* caused a lifeboat to be lowered, and despatched his chief officer in her with a line to take off a warp from the *Waverley*, and with directions to ask 500*l.* for towing her to Lisbon (the distance of which was, I think, between twenty and thirty miles from the place where the towing began), if an agreement was insisted upon by the master of the *Waverley*. When the life-boat came alongside of the *Waverley* her master insisted on an agreement, and offered 300*l.* After some discussion it was agreed "to split the difference," and that 400*l.* should be given.

The towing began at 8 A.M. of the 28th. A very "heavy cross sea" was running from N.N.E. and N.N.W. at the time. After an hour the wind increased, and violent squalls came on. The hawsers by which the *Waverley* was towed parted several times. At 4.30 the *Waverley* got across the sea, and drove within three or four miles of the shore. It was dark, and the *Waverley*, under the advice of the *London*, let go her anchors. She had then, I think, made a progress of little more than six miles. The *London* was kept under steam during the night, and the crew of the *Waverley* came on board of her. They returned to the *Waverley* at six the next morning. At 7.15 she shipped her anchor, and was towed without any further parting of hawsers into Lisbon by 1.20 P.M.

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The passengers of the *London* were made to go into quarantine, and the *London* was detained two days longer than she would otherwise have been, and she suffered some damage to her ropes and port gangway-ladder.

It is admitted (the course, I must observe, pursued by the defendants has been very right and proper in making admissions) that "the *Waverley* and her cargo, and the lives of her master and those of her crew who were on board her when she was fallen in with by the *London*, were saved by the aforesaid services from being lost." It appears also that steamships had set out from Lisbon to assist the *Waverley*, and been compelled by the weather to return without reaching her. I have no doubt that a very meritorious salvage service was performed by the *London*, and that, having regard to the value of the *Waverley*, and the principles of private right and public policy upon which the Court proceeds in these cases, the *London* would, if no contract had been made, have been entitled to a remuneration exceeding the sums of 400*l.* and 123*l.* 11*s.* 8*d.*

The question in this case is, whether the contract made before the towing began was afterwards set aside by the parties to it, or from circumstances became null.

I must now advert to a fact in the history of this case, the mention of which I have reserved for this place. On the morning of the 29th, when the crew of the *Waverley* returned to her, the master of the *London* had a conversation with the master of the *Waverley*, of which the following account is given by the former: "I said, my ship is too valuable to risk with the agreement we made yesterday. I would go to work and save his ship, but it would have to be settled by higher powers." He added that the master of the *Waverley* said, "Yes, I can do no more; I have done all I could." The master of the *Waverley* deposed that the master of the *London* said: "The agreement of yesterday I consider as null and void," to which he made no reply; that the master of the *London* then said, "I consider that we have done quite sufficient yesterday for 400*l.*" He replied, "Captain, you have done your duty well;" and he repeated here that the captain of the *London* had, up to this time, behaved very well, and I think there can be no doubt of the fact. The master of the *Waverley* said he knew

he was at the mercy of the captain of the *London*, and he thought, but is not certain, that he said nothing in answer to what was said about the agreement being at an end; he could not remember. The protest which has been put in evidence contains the original agreement, but says nothing about the abandonment of it.

It is contended on behalf of the *London*, that the Court ought to award salvage without reference to the contract, and upon these grounds: first, that it was originally inequitable; secondly, that circumstances of such a character as to vacate it supervened; thirdly, that the abandonment of it was acquiesced in by the *Waverley;* fourthly, that the tender in this case puts the *Waverley* out of Court. The principles which govern the peculiar question of this kind of agreement have been very carefully considered, and consistently enforced by this Court and the Privy Council. I shall endeavour to observe those principles in this case as I did in that of the *I. C. Potter*. (1)

There is no doubt that such an agreement as the present was legally binding when it was made: *The Hope* (2); *The Repulse*. (3) There is equally no doubt that this Court exercises an equitable jurisdiction with respect to such an agreement, and will set it aside if inequitable in its origin: *The Enchantress*. (4)

I cannot think that the circumstances of this case bring it within the principle of a contract originally inequitable. I must look, as was said by the Privy Council in the *Jonge Andries* (5), "at the circumstances under which it was made, and the parties between whom it was made." In the case before me the agreement was made after considerable discussion, and assented to by a person of fully competent knowledge and experience, not an ignorant, uneducated seaman. In the case of the *True Blue* (6), my learned and experienced predecessor said, "The real issue, therefore, which I have to determine in this case is, whether or not an agreement to the effect stated was executed between the parties in the suit. But before I consider this point, I will look to the parties themselves, and their capability of entering into such a contract.

(1) Ante, p. 292.
(2) 1 Wm. Rob. 265.
(3) 2 Wm. Rob. 396.
(4) Lush, 93; 30 L. J. (P. M. & A.) 15.
(5) Swa. 303, at p. 304.
(6) 2 Wm. Rob. 176, at p. 179.

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With respect to the master of the *True Blue*, it is most undeniably clear that he was perfectly competent, acting on behalf of the owners, to enter into any bonâ fide agreement which he might think requisite, for the purpose of fixing the remuneration for the services he required. With regard to the salvors, on the other hand, I see no reason to suppose that they were persons so uninformed and ignorant of their own interests, as not to be equally capable of binding themselves by an agreement to which both of them had appended their signatures. There was no such imminent emergency as to prevent time for due consideration. The weather was moderate when they came on board, and there was nothing to induce them to enter into the agreement without a just regard to their own interests, and the extent of the service to be performed. Of all persons in the world they were the most competent to form an estimate as to the value of the service which was required from them."

In the present case, moreover—and this circumstance is important in its bearing on the other points—it was clearly a contract for salvage service, though it assumed the form of towage; it was not denied that 400*l.* very largely exceeded the usual towage remuneration to Lisbon, from the place where the *Waverley* was.

Then as to the next contention, that supervening circumstances annulled the agreement. In the *True Blue* (1), the judge said: "It is no argument against the validity of the contract that, in the first instance, it was entered into under the impression that the service would be light, but that, in consequence of a change of weather, or other circumstances of that nature, it subsequently became more onerous. It is the very nature of agreements of this kind to fix a stated sum as a compensation for a stated service, and the parties who enter into the engagement take the risk of any change of circumstances which may in effect alter the extent of the stipulated service."

This question was also fully discussed by the Privy Council in *The Minnehaha* (2), in which case the two rules of this Court were confirmed: 1st, That circumstances might supervene which might justify an abandonment of the contract, but, 2ndly, where these did supervene, it was still the duty of the towing vessel to remain by

(1) 2 Wm. Rob. at p. 180. (2) Lush, 335; 14 Moo. P. C. 133.

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and aid the towed vessel. In *The I. C. Potter* (1), I said (citing *The Galatea* (2) and *The White Star* (3)), "In my judgment there must be among the supervening circumstances an element of serious danger not in contemplation of the parties to the contract in order to justify the abandonment of the contract, and to found a salvage service." I said also, "that the true criterion by which it is to be ascertained whether the towing vessel has become a salvor is whether the supervening circumstances were such as to justify her in abandoning her contract."

I adhere to my ruling on these two points, and proceed to apply it to the circumstances of the present case.

When the agreement was made the sea was very heavy, the weather, though moderate, rough and threatening, and such that the steam-tugs could not come from Lisbon to assist the *Waverley*. The weather on the one hand became worse after the first towing began, and on the other hand much better when the second part of the towing was accomplished on the next day. The master of the *London* no doubt expected to perform the whole service of towing on the first day, and believed that the weather would enable him to do so; he was disappointed, but this was the very risk which he undertook by his agreement—had the weather become suddenly fine, and his task become comparatively easy, the *Waverley* could not have demanded a shilling by way of reduction of the 400*l.* which she had promised to give. The contract was not, in my opinion, annulled by any change in the weather, or by the greater difficulty and delay which therefrom attended the performance of the service; such as the parting of the hawsers and the like. Then, when the *Waverley* anchored for the night, within little more than fifteen miles of Lisbon, it was the duty of the *London* to remain by her—the coming of the crew of the *Waverley* on board of the *London* was a proper precaution to take on behalf of both vessels. The *London* had towed the *Waverley* to a place in which, if her anchors had parted, both ship and crew would have been in great danger of being lost; but did the *London* herself thereby encounter sudden and new peril which could not have been expected? The Elder Brethren are most

(1) Ante, pp. 292–298. (2) Swa. 349.
(3) Law Rep. 1 A. & E. 68.

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clearly of opinion that she encountered no danger at all in fulfilling her duty by remaining by the *Waverley* that night.

It must be carefully borne in mind that it was not till the next morning that the master of the *London* declared the contract to be at an end. On what ground? Why, really that the towage service had turned out a more difficult task than he had expected, and that the interest of his owners required that he should have demanded a larger sum than he had demanded. Possibly he had obtained during the night fuller information than he before possessed as to the value of the cargo of the *Waverley*. But however this may be, I am of opinion that the supervening circumstances in this case were not such as to justify him in abandoning his contract. Some light is thrown upon this matter by the subsequent history. The vessels that morning, when the *Waverley* shifted from her anchor, were from fifteen to twenty miles only distant from Lisbon; and the *London* towed the *Waverley* this distance that morning without interruption and without a single hawser parting.

Then as to the alleged acquiescence of the master of the *Waverley* in the new agreement; I cannot construe the evidence so as to support this position. What could the master do—towed near a lee shore in these circumstances—but say, as in effect he did say, "I am at your mercy; if you choose to say the contract is at an end, I cannot help myself." I cannot consider that there was any voluntary abandonment of the original agreement.

It remains only to notice the last point taken on behalf of the *London*, namely, that the *Waverley*, by tendering the additional sum of 125*l.* 11*s.* 8*d.* to cover the expenses of the crew of the *Waverley* while on board the *London* and the quarantine expenses, has annulled the original agreement for £400. I do not think this inference is correct in point of law. It would surely be very inequitable. It is much the same thing as if she had offered to pay some extra sum for the loss of the *London's* ropes or some damages inflicted upon her while towing.

I feel as strongly as any of my predecessors in this chair have felt the duty and expedience of encouraging by liberal remuneration all salvage services, but I feel not less strongly the duty and expedience of not allowing a contract deliberately entered into

between perfectly competent parties to be set aside by either of them, because the execution of it has turned out more difficult or more easy than was anticipated at the time of making the contract.

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I pronounce for the tender with costs, from the time it was duly made an act of Court.

Solicitor for plaintiffs: *Cooper.*

Proctors for defendants: *J. R. & G. Burchett.*

THE GAUNTLET.

August 2.

The Foreign Enlistment Act, 1870 (33 & 34 *Vict. c.* 90) *s.* 8, *sub-s.* 4—*Military or Naval Service—Employment of a Steam-tug to Tow a Prize of War—Title of Captor to Prize, when complete.*

During the late war between the North German Confederation and France, a Prussian merchant vessel was captured in the English Channel, as prize of war, by a ship in the service of the government of France. A prize crew, under the command of an officer in the French naval service, was put on board the prize; afterwards the prize was driven, by stress of weather, to the Downs, and on the 24th of November, by order of an admiral in the French naval service, she anchored off Deal, within three marine miles of the shore. On the 26th of November, the collector of customs at Deal told the French consul there that it was time the prize left British waters. The French consul having found the *Gauntlet*, a British steam-tug, by accident at anchor in the Downs, the steam-tug, in pursuance of an agreement made between her master and the officer in command of the prize, and under the direction of such officer, towed the prize to Dunkirk Roads for the ordinary towage remuneration, which was afterwards paid by the French consul-general in London. At the time the agreement was made, the master, who was one of the owners of the steam-tug, had reasonable cause to believe that the prize was a prize of war, captured by the French.

In a suit instituted on behalf of the Crown, for the condemnation of the steam-tug:—

Held, that no offence against the Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90), had been committed.

Semble, that the steam-tug was not employed in the military or naval service of France.

Quære, Whether it is necessary to complete the title of the captor to prize of war, that the prize should be carried within the territory of the captor.

Revd 4 P.C. 184

THIS was a cause instituted by Francis Hart Dyke, Esquire, Her Majesty's Procurator-General, on behalf of Her Majesty

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against the steam-tug *Gauntlet*. The petition was in substance as follows:—

1. On the 24th day of November, 1870, the ship *Lord Brougham*, of the port of Hamburgh, having been then lately captured on the high seas by a French vessel of war as a prize of war, anchored in the Downs, to wit within three marine miles of the shore of England, being in the possession of the government of France and in charge of a French prize crew.

2. On the same day, Henry Beer Mumford, one of the owners of the *Gauntlet*, did, without the licence of Her Majesty in that behalf, to wit, at Deal, in the county of Kent, make and enter into a certain agreement, to wit an agreement with Le Sauret, then being French consul at Folkestone, in the county of Kent, and in the service of the French government, that in consideration of a sum of money to be paid, to wit, by the French consul-general in London on behalf of the French government, to wit, to the said Henry Beer Mumford and the other owners of the said steam vessel, he would despatch the said vessel *Gauntlet*, in order or with intent that the said steam vessel should, or with knowledge or having reasonable cause to believe, that she would be employed in the naval service of France, in towing the said ship *Lord Brougham* from the place where she then was in charge of a French prize crew as such prize of war as aforesaid, to wit, from within three marine miles from the shore of England to the port of Dunkirk in France.

3. On the 26th day of November and following days the said Henry Beer Mumford did accordingly, in pursuance of the said agreement, and without the licence of Her Majesty, despatch or cause or allow to be despatched, the said steam vessel *Gauntlet*, in order or with intent that the said steam vessel should, or, with knowledge or having reasonable cause to believe, that she would be employed in the naval service of France as aforesaid in towing the said ship *Lord Brougham*, then being in charge of a French prize crew as such prize of war as aforesaid, to wit, from within three marine miles of the shore of England to the said port of Dunkirk in France.

4. The said steam vessel *Gauntlet*, then being in charge of the servants of the said Henry Beer Mumford and the said other owners, was thereupon accordingly, without the licence of Her Majesty, employed in the naval service aforesaid of France in towing, and did tow, the said ship *Lord Brougham*, then being in charge of a French prize crew as aforesaid as such prize of war as aforesaid, to wit, from within three marine miles of the shore of England to the said port of Dunkirk.

5. During all the times aforesaid, France was a state at war with Prussia, and Prussia was a state at peace with Her Majesty, as the said Henry Beer Mumford and the other owners of the said steam vessel *Gauntlet* during all the times aforesaid well knew.

6. By reason of the premises, the said Henry Beer Mumford did within Her Majesty's dominions, and without the licence of Her Majesty, within the meaning of the Foreign Enlistment Act, 1870, despatch and cause and allow to be despatched the said steamship or vessel *Gauntlet*, in order or with intent that she should, or with knowledge or having reasonable cause to believe that she would, be employed in the naval service of a foreign state, to wit, France, then at war with a state, to wit, Prussia, then at peace with Her Majesty, and the said steamship or vessel

and her equipment thereby became and were and are forfeited to Her Majesty, in pursuance and under the provisions of the said Act.

By the prayer of the petition the judge was asked to decree the *Gauntlet* and her equipment to be forfeited to Her Majesty, and to decree possession thereof to Her Majesty, and otherwise to administer right and justice in the premises.

An answer to this petition was filed by the solicitors for the owners of the *Gauntlet*, but it is unnecessary to set out the allegations in the answer, because, after the pleadings were concluded, the principal facts of the case were admitted. The following are the admissions:—

We, Francis Hart Dyke, Esquire, Her Majesty's Procurator-General, for the plaintiff, Lowless, Nelson, and Jones, solicitors for the defendants, admit as follows:—

1. That on or about the 20th day of November, 1870, the ship *Lord Brougham*, in the petition filed in this cause referred to, was duly captured in the English Channel, as prize of war, by a ship of war in the service of the government of France.

2. That at the time of such capture the said ship *Lord Brougham* was the property of subjects of the King of Prussia, and was sailing under the Prussian flag, on a voyage from South America to Hamburg with a cargo of merchandise.

3. That upon such capture the greater number of her crew were taken out of the said ship *Lord Brougham*, as prisoners of war, and a prize crew from the said French ship of war, under the command of an officer in the French naval service, was put on board of the ship *Lord Brougham*.

4. That after the said capture the *Lord Brougham* was driven, by stress of weather, to the Downs, where she arrived on the 24th of November, 1870 (and by order of an admiral in the French naval service commanding the French ship of war, *La Provence*, then lying in the Downs) anchored near to the said ship *La Provence*, and within three marine miles of the shore of England.

5. That the French ship of war, *La Provence*, left the Downs on the 25th of November, 1870, leaving the said *Lord Brougham* still at anchor there.

6. That on the 27th of November the said steam-tug *Gauntlet* made fast to the said ship *Lord Brougham*, at the place where she was lying at anchor in the Downs as aforesaid, and towed her to Dunkirk Roads, and there left her.

7. That the said ship *Lord Brougham* was so towed as aforesaid under and in pursuance of a certain agreement for that purpose, and which agreement is in the words and figures following, that is to say:—

"We, the undersigned, do agree to tow the *Lord Brougham* from the Downs to Dunkirk Roads, for the sum of 70*l.* sterling.

"(Signed) "H. B. Mumford,
"Douzouville."

8. The said Henry Beer Mumford, one of the parties to the said agreement, is one of the above-named defendants and a part owner of the said steam-tug *Gauntlet*. The said M. Douzouville, the other party to the said agreement, was

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the prize captain of the said *Lord Brougham*, and the said agreement was signed in the presence and with the concurrence of the said Le Sauret, one Woodruffe being also present.

That the said sum of 70*l.*, mentioned in the said agreement, is a usual charge for the towage of such a vessel as the *Lord Brougham* from the Downs to Dunkirk Roads.

10. That as soon as the *Gauntlet* had towed the said vessel, *Lord Brougham*, to Dunkirk Roads, J. W. West, the captain of the *Gauntlet*, presented to the said M. Douzouville the usual towage certificate, which is in the words and figures following, that is to say:—

"I hereby certify that the steam-tug *Gauntlet* has towed the ship *Lord Brougham*, under my command, from the Downs to Dunkirk Roads to my satisfaction, for which please pay the sum of 70*l.* sterling.

"The 27th day of November, 1870.

"Douzouville."

11. The said certificate having been signed by the said M. Douzouville, was on the return of the *Gauntlet* to Deal presented by the said J. W. West to the said M. Le Sauret for payment of the said sum of 70*l.* The said M. Le Sauret then handed to the said J. W. West an order upon the French consul-general in London for payment of the said sum. Such last-mentioned order, accompanied by the said certificate, was on the 7th day of December presented to the said French consul-general in London, who, on the 27th day of December, 1870, paid the said sum of 70*l.*

12. That the *Lord Brougham*, during such voyage to Dunkirk Roads, was in charge of the said prize crew and the officer commanding the same.

On the 25th day of July the cause came on for hearing. The only matter of fact in issue related to the transactions which took place on the 26th of November, between the collector of customs at Deal, the port near which the prize was anchored, and the French consul there or his agent. Mr. Reynolds the collector of customs at Deal, and M. Le Sauret, the French consul there, were called as witnesses. The result of their evidence appears from the judgment.

Sir Robert Collier, A.G., Sir Travers Twiss, Q.A., and *Archibald*, for the Crown. The substantial question in the case is, was the tug engaged in the military or naval service of France within the meaning of the phrase military or naval service as used in the Foreign Enlistment Act, 1870, s. 8, subs. 4. It is clear that a tug towing an armed vessel into action or towing an armed vessel when disabled out of action would be employed in a naval service. So if the tug had towed an armed vessel in order to assist her in capturing the *Lord Brougham*, she would have been employed in a naval service. The principle in the present case is the same.

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She has rendered assistance in order to complete a hostile and aggressive act. The capture was incomplete until the *Lord Brougham* was brought within French territory and condemned by a French prize court. The tug, when she towed the *Lord Brougham* into French waters, assisted the captors to render the capture complete; without her assistance the capture might never have been completed. The French cruisers by getting the prize thus brought readily within French waters were freed from the burthen of guarding her and conducting her there, and so were set at liberty to make fresh captures. The tug was under the command of the prize captain of the *Lord Brougham*, and acted under his directions, and so was in the service of the French navy. *The Christina* (1); *The Cleadon.* (2)

The Admiralty Advocate (*Dr. Deane, Q.C.*), and *Edwyn Jones*, for the defendants. The act itself defines the meaning of the phrase "naval service." The interpretation clause, s. 30, enacts that naval service shall as respects a ship include any user of a ship as a transport, store ship, privateer or ship under letters of marque. The present case clearly does not fall within any of the definitions given in that clause, and the effect of the interpretation clause is to narrow the general meaning of the phrase defined. But even setting the interpretation clause aside and taking the phrase, naval service, in its broadest sense, it is impossible to say that it can extend to any service not immediately connected with some act of war. It may, no doubt, happen that a steam-tug may be employed in a towage service so intimately connected with an act of war, as to constitute a military service, but the present is not such a case. The tug in the present case was not employed to complete the capture. The act of capture is final, so far as the title of the captor is concerned. It was unnecessary to bring the captured vessel within the territory of the sovereign of the captor. *The Henrick and Maria* (3), *The Polka.* (4) Phillimore's International Law, vol. iii. p. 460, s. 357; Twiss on the Law of Nations, vol. ii. p. 369, s. 186. If the title of the captors was complete on the completion of the capture, there is no pretence for saying that the towing of the prize constituted in any sense a naval

(1) 6 No. Ca. 4; on appeal, 361.
(2) Lush. 158; 14 Moo. P. C. 92.
(3) 4 Rob. 43
(4) Spinks, 57.

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service. As well might it be contended that towing any French merchantman constituted a naval service. The statute is a penal statute, and must be strictly construed, and the circumstance that the *Lord Brougham* was towed out of the Downs, not at the instance of the French authorities, but at the instance and with the cognisance of the British authorities, is a fact not to be lost sight of in considering with what intention the service was rendered.

Sir Travers Twiss, in reply. The definitions given in the interpretation clause are not exhaustive. *Ex parte Ferguson and Hutchinson.* (1)

Cur. adv. vult.

August 2. SIR ROBERT PHILLIMORE. This is a suit instituted on behalf of the Crown by Her Majesty's Procurator-General, against a steamship called the *Gauntlet.* The petition prays, "that this ship may be decreed to be forfeited to the Crown, on the ground that the ship has violated the provisions of the Foreign Enlistment Act, and more especially those contained in the 8th section of that statute." That section (s. 8) provides, "That if any person within Her Majesty's dominions, without the licence of Her Majesty, does any of the following acts, that is to say, . . . (s. 4) despatches, or causes or allows to be despatched, any ship with intent or knowledge, or having reasonable cause to believe, that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state, ... the ship, in respect of which any such offence is committed, and her equipment shall be forfeited to Her Majesty."

The interpretation clause (s. 30) to which I must again presently advert, enacts, "that naval service shall, as respects a person, include service as a marine, employment as a pilot in piloting or directing the course of a ship of war or other ship when such ship of war or other ship is being used in any military or naval operation, and any employment whatever on board a ship of war, transport, store-ship, privateer, or ship under letters of marque; and as respects a ship, include any user of a ship as a transport, store-ship, privateer, or ship under letters of marque."

The principal facts of the case to be derived from the admis-

(1) Law Rep. 6 Q. B. 280.

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sions of both parties filed in court, and the evidence of the two witnesses examined in court, are as follows:—The *Lord Brougham* was a Prussian merchant vessel laden with cargo, on her voyage from South America, and on the 20th of November, 1870, was captured in the English Channel by a French man of war; a prize crew, with an officer, was put on board of her. Stress of weather drove the belligerent cruiser and her prize into the Downs, where she anchored within a marine league of the English shore and near to a French man-of-war, *La Provence*. This was on the 24th of November. According to the instructions issued by Her Majesty's government during the late war, any belligerent ship which has entered the territorial waters of Her Majesty, is required to depart and put to sea in twenty-four hours, except in case of stress of weather, and "armed ships of either party are interdicted from carrying prizes made by them into the ports, harbours, roadsteads, or waters of the United Kingdom, or any of Her Majesty's colonies or possessions abroad."

It appears that on the 25th of November, *La Provence* sailed away, leaving the prize at anchor. On the 26th, the collector of customs had an interview with an agent of the French consul, and called his attention to the orders of Her Majesty's government, and asked him "if the French consul was coming to see him about the ship, as it was time she started;" the reply was, that the French consul had been telegraphed for. The French consul arrived on the same day at Deal, went to the office of the collector of customs, and said to him, "I come to speak about the *Lord Brougham*, as you have sent me word that she was to be moved at once. I did telegraph to many places to have a tug, and I found one that was by accident at anchor in the Downs. This tug was not the one for which I had telegraphed. The collector of customs said, "That's all right."

This steam-tug so hired was the *Gauntlet*, the agreement for her hire was this:—

"We, the undersigned, do agree to tow the *Lord Brougham* from the Downs to Dunkirk Roads for the sum of 70*l.* sterling.

"(Signed) "H. B. Mumford,
"Douzouville."

Mumford was a part owner of the *Gauntlet;* Douzouville was

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the prize captain. The sum of 70*l.* was the ordinary and usual sum for the towage of a merchant-vessel from the Downs to Dunkirk Roads. To these roads the prize was towed by the *Gauntlet*, on the 27th of November. Her master presented to the French consul the following paper:—

"I hereby certify that the steam-tug *Gauntlet* has towed the ship *Lord Brougham*, under my command, from the Downs to Dunkirk Roads to my satisfaction, for which please pay the sum of 70*l.* sterling.

"The 27th day of November, 1870,

"Douzouville."

The question for the Court to consider is, whether these facts render the *Gauntlet* liable to condemnation under the provisions of the statute to which I have adverted.

The statute is a highly penal one; as to its general character I have expressed my opinion in the recent case of *The International*. (1) I will only now say that it is my duty neither to weaken the effect of the statute by a tenderness to the circumstances of a particular case, nor to strain the provisions of it so as to include a case which is not clearly within them. There is one argument on the construction of the statute which I wish to dispose of in limine. It has been contended by the defendants that the interpretation clause limits and restrains the enacting clause, and that inasmuch as "steam-tug" is not among the vessels therein enumerated there is a casus omissus in the statute which disposes of the present case in favour of the defendants. I am of opinion, however, that the interpretation clause is not of a restrictive but of an enlarging character. I am glad to be fortified in this conclusion by the opinion of Mr. Justice Blackburn in *Ex parte Ferguson and Hutchinson* (2) upon a similar clause in the Merchant Shipping Act, as to which he says: "The argument against the proposition is one which I have heard very frequently, viz., where an Act says certain words shall include a certain thing, that the words must apply exclusively to that which they are to include. That is not so; the definition given of a 'ship' is in order that 'ship' may have a more extensive meaning."

(1) Ante, p. 321. (2) Law Rep. 6 Q. B. 280, at p. 291.

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The arguments on behalf of the Crown for the condemnation of this vessel have been, first and principally, that the consequences of the act of capture were incomplete until the prize had been brought infra præsidia, and that these consequences were completed by the agency and intervention of the *Gauntlet:* that the towing was connected with the original seizure—was indeed a continuance of that belligerent act, that if the intention had been merely to take the vessel out of neutral waters the case would have been subject to different considerations, but here she was brought in safety into the waters of the captor's country, and the captor was relieved from the necessity of protecting his prize during the transit across the Channel: that the *Gauntlet* was for the time the servant of the French captain, and hired by the French consul so as to be employed in the French naval service. It was also contended that the captured vessel, having a prize crew commanded by an officer on board, was herself a ship of war; and it was urged that for one or for all of these reasons the *Gauntlet* has been despatched by her owner without the licence of Her Majesty, "with reasonable cause to believe" that it would be employed in the naval service of France, and therefore has incurred the penalty of condemnation. I think this is a fair summary of the arguments of the counsel for the Crown. I proceed to consider their force and effect, bearing in mind the reply which has been offered to them by the counsel for the defendants. First, I am unable to assent to the main position with respect to the completion of the act of capture by the employment of the *Gauntlet*, having regard to the circumstances of this case. It is true that various opinions have been expressed by great authorities on international law as to what constitutes a consummation so to speak of the act of capture, what is the criterion of the property in the vessel having become finally vested in the captor; and the deductio infra præsidia of the country of the captor is by general recognition a certain and secure, and I may add, in my opinion the proper means, of effecting the transfer of such property, but at the same time this act cannot be said, having regard to the practice of states, to be the only criterion or the only means. I cannot express myself so well on this point as in the language of Lord Stowell in *The Henrick and Maria.* (1) In that case the condemnation in the

(1) 4 Rob. 43.

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court of the enemy of a prize ship lying in a neutral port was holden to warrant the sale of her to a neutral merchant; Lord Stowell says:—

Without entering into a discussion of the several opinions that have been thrown out on this subject, I think I may state the better opinion and practice to have been that a prize should be brought infra præsidia of the capturing country, where, by being so brought, it may be considered as incorporated into the mass of national stock. The greatest extension that has been allowed has not carried the rule beyond the ports or places of security, belonging to some friend or ally in the war, who has a common interest in defending the acquisitions of the belligerent made from the common enemy of both.

In later times an additional formality has been required, that of a sentence of condemnation in a competent court, decreeing the capture to have been rightly made, jure belli; it not being thought fit in civilized society that property of this sort should be converted without the sentence of a competent Court pronouncing it to have been seized as the property of an enemy, and to be now become, jure belli, the property of the captor. The purposes of justice require that such exercises of war should be placed under public inspection; and therefore the mere deductio infra præsidia has not been deemed sufficient. No man buys under that title, he requires a sentence of condemnation as the foundation of the title of the seller; and when the transfer is accepted, he is liable to have that document called for as the foundation of his own. From the moment that a sentence of condemnation becomes necessary, it imposes an additional obligation for bringing the property on which it is to pass, into the country of the captor; for a legal sentence must be the result of legal proceedings in a legitimate court, with competent authority upon the subject-matter, and upon the parties concerned, a court which has the means of pursuing the proper inquiry, and enforcing its decisions. These are principles of universal jurisprudence applicable to all Courts, and more particularly to those which, by their constitution in all countries, must act in rem, upon the corpus or substance of the thing acquired, and upon the parties, one of whom is not subject to other rights than those of war, and is amenable to no jurisdiction but such as belongs to those who possess the rights of war against him.

Upon principle, therefore, it is not to be asserted, that a ship brought into a *neutral port* is, with effect, proceeded against in the belligerent country. The res ipsa, the corpus, is not within the possession of the Court; and possession in such cases founds the jurisdiction.

It might be reasonably expected that these premises would have led this great judge to the necessary conclusion that the ship not having been brought infra præsidia, and having been condemned while lying in a neutral port, had not passed by a legal title to the claimant, but the decision is nevertheless otherwise, for Lord Stowell proceeds to say:—

But it is not to be denied that the Court of Admiralty has gone further. It is now for a considerable time that this Court has been in the habit of condemning prizes carried to Lisbon and Leghorn, at times when I am not at liberty to say, that the sovereigns of those ports were engaged in a common war against the

enemy of this country. The fact that the ships proceeded against *here were lying there* has not been dissembled.

After some remarks, he continues:—

Now, unless it can be shewn that there is something in the nature of all these ports that essentially distinguishes them from the common character of neutral ports, not merely in certain other respects, but such as furnish a ground of solid distinction for purposes of this nature, I think it will be difficult to avoid the consequence, that whatever the correct principle may be, and however much it might import this country to respect and enforce this principle, this Court *at least* is bound against that principle by its own practice. . . .

How far the superior Court will consider this question as concluded by the practice, even an inveterate practice, of this Court, is more than I can say. It might be extremely proper that the opinion of that Court should be taken upon this important question. It may deem it to be its duty, for anything I know (for it would be presumptuous in me to hazard a conjecture), to recall the practice of this Court to the proper purity of the principle. But sitting here and observing, as I am judicially bound to do, the course of judicial administration which has prevailed, I do not feel *myself* authorized to uphold the sentences which have passed in this court over prizes carried into foreign ports, and disallow, at the same time, the validity of such as the enemy has pronounced under circumstances as not to afford ground of distinction between them, which appears to my judgment sufficiently solid.

The course which Lord Stowell evidently wished to be taken was pursued. The case was appealed; but in spite of this strong expression of Lord Stowell's opinion, I find that this case of the *Henrick and Maria* was affirmed by the Lords Commissioners of Appeal on the 7th of August, 1807. (1)

During the late war with Russia, my immediate predecessor in this court, while maintaining that a prize condemned ought to be in the belligerent territory, nevertheless condemned, though reluctantly, a prize lying in a neutral port, the sovereign of which expressly consented to such condemnation: *The Polka.* (2)

Can I, in the face of these judgments, but more especially of the former, pronounce under the provisions of a penal statute, a sentence of forfeiture to the Crown of this vessel on the ground that by bringing the French prize infra præsidia of France, she had completed the title of her possession only inchoate by the act of the French capture? I am of opinion that I cannot do so. But I must also observe, that in considering the force of this argument that the property in the prize could not pass without

(1) 6 Rob. 138, n. (2) Spinks, 57.

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bringing her infra præsidia, the practice of the Courts of the captor, as well as that of our own Courts, must be examined. It appears to me clear that the French tribunals of prize would hold that this deductio infra præsidia was not necessary to confer a valid title to the property: De Pistoye et Duverdy, Traité des prises Maritimes, pp. 173, 176, 225, and 229.

This vessel, then, would have been condemned while lying in neutral waters by a properly constituted tribunal of prize sitting in France, and it is to be observed that if the *Gauntlet* had lain for months instead of days in neutral waters, the captor would, according to the argument, have acquired no legal property in the prize. Such a tribunal could not indeed be lawfully constituted, or lawfully sit in a neutral territory. But it may be that with the permission of the neutral state, the prize locally situate in his waters might be condemned by the belligerent tribunal sitting in the belligerent state. Whether the neutral state, by such permission might not provoke a serious question as to the strict maintenance of her neutral character, and whether such permission must not be equally granted to both belligerents, and whether even such a course would not involve the neutral state in great difficulties, are grave considerations into which I have not to inquire. The fact that, apart from the order of Her Majesty's government, such a sentence of condemnation would not be illegal, is only adverted to by me for the purpose of shewing that the contention that the *Gauntlet* is brought within the penal clauses of this statute because her act alone enabled the belligerent to acquire a valid title to this prize cannot, in my opinion, be sustained.

But if the vessel had become jure belli a French vessel, then it was as lawful for the neutral steam-tug to tow her as it would have been for her to have towed any merchant vessel, originally French, across the Channel, though she had been hired for this purpose by the captain of a belligerent ship with the approval and intervention of the French consul. The case has been put of a neutral steam-tug attendant upon a belligerent ship and employed in towing away the prizes which she made, and it has been asked whether such conduct, relieving the belligerent ship from the encumbrance of protecting her prizes and enabling her either to go into action against the enemy or to make fresh prizes, would

not be an employment in the naval service of the belligerent? I mean to express no doubt that the judicial answer to this question would be in the affirmative, but the circumstances of the present case are materially and essentially different; the *Gauntlet* was in no way whatever, directly or indirectly, connected with, or ministering to, the capture of the vessel. She had, indeed, "reasonable ground to believe" at the time when she was hired that the vessel which she was employed to tow had been captured from the German belligerent, but that was all. For that there was any intention on the part of the *Gauntlet* to infringe the provisions of the Foreign Enlistment Act is not only an inference unwarranted by the facts in evidence before me, but, in truth, the contrary is to be presumed from them. The English collector of customs tells the French consul that this vessel cannot remain in English waters, he is the person who originates and demands her removal. The consul says, and says quite truly, that he had accidentally found a steam-tug which would tow her away; the collector is perfectly satisfied; no suggestion of anything illegal in the transaction is made; and the tug proceeds to do her ordinary work for the ordinary price. And I may here observe, that it is not only a fact of notoriety, but one proved in the recent suits instituted in this court by English owners of cargo against German merchantmen, that there was no German cruiser in the channel at this time, and that the transit was practically unattended by any risk or peril arising out of the war. Having towed the vessel across the Channel, the master of the tug, on presenting a certificate that he had performed his service, receives the ordinary price from the French consul on his return. It may indeed be, that however innocent as to intention, the *Gauntlet* has, as a matter of fact, violated the provisions and incurred the penalties of the statute; but it is certainly a conclusion at which the Court would be reluctant to arrive. Then it has been contended, that inasmuch as the vessel had a prize crew and officer on board, she was a ship of war, and, therefore, to tow her was to be employed in the naval service of the belligerent. I do not assent to this proposition. The prize crew and officer are not put on board a prize for the purpose of enabling her to cruise against the enemy, but for the purpose of maintaining the capture and preventing the

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native crew from rescuing the vessel. She was not commissioned, and was not a ship of war.

4 P.C. 186

Upon the whole, I am of opinion that the circumstances of this case do not warrant me in pronouncing that the *Gauntlet* is forfeited to the Crown on the ground of her having been despatched with reasonable cause to believe that she would be employed in the naval service of France, and I dismiss her with her costs from this suit.

For the Crown: *Queen's Proctor.*

Solicitors for owners of the *Gauntlet: Lowless, Nelson, & Jones.*

March 28.

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Charterparty—Performance of Contract rendered Unlawful by Outbreak of War—Imminence of War—Effect of upon Rights of Parties—Pro ratâ Freight where Contract put an end to by War.

Port 7 Q.B. 415 Port 1 Ex. 4 Ass. 24 — 172

The master of a Prussian brig, a subject of the King of Prussia, agreed by charterparty with persons representing the plaintiffs, that the brig should load a cargo of nitrate of soda at a port in South America, and proceed therewith to Cork, Cowes, or Falmouth, for orders to any safe port in Great Britain, or on the Continent, between Havre and Hamburg. The brig was loaded with a cargo of nitrate of soda at a port in South America as agreed, and sailed on her homeward voyage. Before sailing the master signed a bill of lading, which, after stating that the brig was bound to Cork, Cowes, or Falmouth for orders, provided that the cargo should be delivered to the plaintiffs, the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever excepted. At the time of the making of the charterparty, and from thence until after the sailing of the ship, Prussia was at peace. On the 10th of July the brig arrived at Falmouth, and the next day she received orders to proceed to Dunkirk. She sailed for Dunkirk, and arrived off that port on the 16th, but the tide did not serve for her to enter. While off the port on the 16th, the brig was boarded by a pilot, who told the master that war had broken out between France and Prussia. The brig then returned to the Downs, and anchored there on the 17th, which was Sunday. On the 18th the master telegraphed to the owner of the brig for instructions, and the owner answered that the brig was not to go to Dunkirk. On the 19th the brig put into the port of Dover, and there she remained.

It was proved that on the 10th of July the apparent imminence of war between France and Prussia was such as to alarm all Europe, and that on the 15th of July the French government made a formal declaration in the Corps Législatif and in the Senate, stating that the King of Prussia had notified to the French ambassador at Berlin that he would not receive him any more, and had communicated

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this refusal to the cabinets of Europe. No formal declaration of war was delivered till the 19th. On that day the French government delivered a declaration of war to the Prussian government.

Held, that the master of the brig was entitled, under the circumstances, to pause before entering the port of Dunkirk, and to take a reasonable time for making inquiries, and that he was not guilty of any breach of duty or breach of contract.

After the 19th of July the plaintiffs demanded of the master the delivery of the cargo at Dover, but made no definite offer to pay pro ratâ freight. The master refused to comply with this demand :—

Held, that the refusal of the master was justifiable, and that he was not bound to deliver the goods without some compensation for the carriage of the goods.

Affirmed by P.C. 1874 P.C. 171

THIS was a cause instituted under the 6th sect. of the Admiralty Court Act, 1861, on behalf of Messrs. Duncan, Fox, & Company, of Liverpool, consignees of cargo laden on board the vessel *Teutonia*, against the said vessel and freight, and against Daniel August Köster, of Hamelwörden, in Hanover, merchant, the owner of the said vessel, the defendant in the cause intervening.

The petition alleged in substance as follows :—

1. In or about the month of April, 1870, whilst the *Teutonia* was lying in the port of Pisagua, Messrs. Sawers, Duncan, & Company caused to be shipped on board her certain goods of the plaintiffs, consisting of 2742 bags of nitrate of soda, to be carried in the said vessel from Pisagua to Cork, Cowes, or Falmouth, for orders, and thence to a port as ordered under a certain bill of lading, signed and delivered by the master of the said vessel, in the words and figures following (that is to say) :—

"Shipped in good order and well-conditioned by Sawers, Duncan, & Co., of Valparaiso, upon the ship *Teutonia*, whereof Köster is master for this present voyage, and now lying in the port of Pisagua, and bound for Cork, Cowes, or Falmouth for orders, 2742 bags, weighing in all 7623 quintals net Spanish weight, being marked and numbered as per margin, to be delivered in the like good order and well-conditioned at port of discharge, the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted, unto Messieurs Duncan, Fox, & Co., or assigns. Freight for the said goods to be paid as per charterparty, with primage and average accustomed. In witness whereof the master or purser of the said ship or vessel hath affirmed to three bills of lading, all of this tenor and date; the one of which bills being accomplished the others to stand void.

"Dated in Pisagua, this 5th day of April, 1870."

2. The said vessel proceeded with the said goods on board to Falmouth, for orders, and was there duly ordered by the plaintiffs to proceed with the said cargo to the port of Dunkirk, and there deliver the same cargo, the said port of Dunkirk being a port to which the said ship was bound to proceed agreeably to the terms of the said bill of lading and charterparty.

3. All conditions were fulfilled, and all things were done and happened, and all

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times elapsed necessary to entitle the plaintiffs to have the terms of the said bill of lading observed by the defendant, and to have the said cargo carried in the said vessel to and delivered at Dunkirk.

4. The master of the said vessel, notwithstanding the premises, made default in obeying the said orders, and neglected and refused to proceed with the said cargo to the said port of Dunkirk, and to deliver the said cargo there.

5. Subsequently to the said refusal, and after war had been declared between France and Germany, and while such war existed, the plaintiffs demanded the possession of their said cargo of the said master, at Dover, into which port the said master had taken the *Teutonia*, and where she was then lying, with the said cargo on board her; but, although the plaintiffs were entitled to such possession, the defendant refused and neglected to give possession of the said cargo to the plaintiffs, and to allow them to have possession thereof.

6. By reason of the premises, the plaintiffs have incurred great loss, and have been put to great expense.

The answer of the defendant was in substance as follows:—

1. The defendant and the master of the *Teutonia* were and are subjects of the King of Prussia, and the *Teutonia* was and is a German vessel subject to the laws of Prussia, and the goods which the said vessel was carrying, as in the petition alleged, were contraband of war.

2. The port of Dunkirk to which the *Teutonia* was ordered to proceed with her cargo, as in the petition alleged, was and is a French port, in the possession and occupation of the French.

3. By reason of the premises, and of war having been declared and having broken out between Prussia and France after the making of the charterparty and after the sailing of the *Teutonia* from Valparaiso, it became and was illegal according to the laws of Prussia, as well as the law of nations, for the master of the said vessel to proceed with the said cargo to Dunkirk, wherefore the master refused, as he lawfully might, to proceed with the said cargo to Dunkirk, and to deliver the same there, and proceeded to Dover, being a proper port in that behalf.

3A. If war between Prussia and France had not been declared, or had not broken out at the time when the said master made default, as in the 4th art. of the petition alleged, the said war was imminent, and reasonably believed by the said master to have broken out and to have been declared, therefore the said master, as he reasonably might, proceeded to a place which was a reasonable place in that behalf, for the purpose of making inquiries, and for the safety of the ship and cargo, and before a reasonable time for making such inquiries, and for proceeding, as ordered, to Dunkirk had elapsed, war had broken out and been declared between France and Prussia, wherefore the master, as he lawfully might, refused to proceed with the said cargo, and to deliver the same there, which is the default in the 4th art. alleged. (1)

4. When the plaintiffs demanded the possession of the said cargo at Dover, the

(1) This article, and the articles in the reply and rejoinder relating to the allegations contained in it, were added at the hearing pursuant to leave given by the judge.

plaintiffs did not, nor did they at any time before the commencement of this suit, pay or offer to pay to the defendant, the freight payable in respect of the said goods, or any portion thereof, nor to indemnify the defendant against any claim or right to the said goods which any person or persons might acquire. Wherefore the defendant, as he lawfully might, refused to give possession of the said cargo to the plaintiffs, or allow them to take possession thereof.

5. Save as aforesaid, the defendant denies the truth of the several averments in the said petition contained.

The solicitors for the plaintiffs, in reply, alleged as follows:—

1. The plaintiffs have always been and are British subjects.

2. At the time when the said orders were given to the *Teutonia* to proceed with the said cargo to Dunkirk, war had not been declared and had not broken out between Prussia and France, and the master of the *Teutonia*, in obedience to the said orders, proceeded for, and arrived outside of the said port of Dunkirk with the *Teutonia*, and could have entered the same port with the said vessel some days before war had been declared or had broken out between Prussia and France, but the master of the *Teutonia* after having so arrived off the said port wrongfully put back, and proceeded with the *Teutonia* to the said port of Dover.

2A. They deny the truth of the several allegations contained in art. 3 of the defendant's answer.

2B. They say that the said art. 3A of the answer is bad in substance.

2C. The said ship arrived off the port of Dunkirk on or before the 16th of July, 1870, and instead of entering the said port as she could and ought to have done for the purpose of discharging her said cargo, she sailed thence to the Downs, and there anchored on the morning of the 17th of July, 1870, and whilst she was so anchored and before war had been declared or broken out as alleged in the said answer, the defendant, on the 18th of July, 1870, who at such time knew or had the means of knowing that the said war had not been declared or broken out, ordered the master of the said ship not to proceed with the vessel and her cargo to Dunkirk, but to put back to Dover, and thereupon and before the said war had been declared or broken out, the master of the said ship wrongfully and in breach of the terms of the said charterparty and bill of lading, proceeded with the said vessel to Dover.

3. Save as herein appears, they deny the truth of the allegations contained in the 3rd article of the defendant's answer.

4. In reply to the fourth article of the said answer they say that the defendant was not entitled to any freight or indemnity as therein mentioned.

The solicitors for the defendant, by way of rejoinder to the reply, denied all the several averments therein contained, and further said as follows:—

1. As regards the 1st article of the said reply, they submit that the said article is immaterial and irrelevant.

2. As regards the 2nd article of the said reply, the master of the *Teutonia* did not, as therein alleged, wrongfully put back and proceed to the port of Dover but the said master having waited a reasonable time in that behalf, on account of

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the circumstances mentioned in the defendant's answer, did not take the *Teutonia* into the port of Dunkirk, but on account of the said circumstances put back and proceeded with his vessel (as he was, under the circumstances, justified in doing) to the port of Dover.

2A. Art. 3A of the answer is good in substance.

2B. Art. 2C of the reply is bad in substance.

3. As regards the 4th article of the said reply, they submit that the defendant was entitled to freight and indemnity as in the defendant's answer alleged.

March 1, 7, 14. The case came on for hearing. It was proved that the goods were shipped at Pisagua under the bill of lading set out in the petition, in pursuance of the terms of a charterparty entered into on the 1st of March, 1870, between the master of the *Teutonia* and Messrs. Sawers, Duncan, & Co., of Valparaiso, a branch of the plaintiff's firm. The charterparty provided that the *Teutonia* should proceed to the port of Iquique where, $\frac{\text{and}}{\text{or}}$ at one adjacent by-port, she should take on board a cargo of nitrate of soda in bags.

The charterparty contained, inter alia, the following provisions :—

"For the loading of said cargo, twenty working lay days shall be allowed to be reckoned from the day the vessel is ready to receive cargo at the respective ports to the day of her dispatch, and ten running days on demurrage at the rate of 6*l.* sterling per day, to be paid daily for each and every day's detention ; time occupied in shifting ports not to count as lay days.

"Should the vessel be unnecessarily detained at any period of the voyage, such detention to be paid for by the party delinquent to the party observant at the above rate of demurrage.

"After receiving on board the said cargo, stowing it in the customary manner, and being duly cleared outwards at the custom-house, the said vessel shall proceed to either Cork, Cowes, or Falmouth, at the option of the master, where he shall receive orders from charterers' agents within three days after his arrival to proceed to any one safe port in Great Britain or on the Continent, between Havre and Hamburg, both included, and there, according to bills of lading and charterparty, deliver the cargo which is to be discharged and taken from alongside as fast as the custom of the port will admit.

"The freight to be paid in manner hereinafter mentioned on a true and right delivery of the cargo in the port of discharge at and after the rate of 45*s.* British sterling in full per ton of 2240 lbs. avoirdupois gross English weight delivered free of commission."

The *Teutonia* sailed on her homeward voyage, and on the 10th of July, 1870, arrived at Falmouth. On the 11th of July she received orders to proceed to Dunkirk. In pursuance of these

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orders she sailed for Dunkirk, and arrived off that port on the 16th of July. A pilot came on board and told the master that war between France and Prussia had been declared two days before. There would not have been water for the vessel to have entered Dunkirk till the evening of the 17th. The *Teutonia* returned to the Downs, and anchored there on Sunday the 17th; her master could obtain no information there, and, on the 18th, he telegraphed to his owner, and received an answer telling him he was not to go to Dunkirk. On the 19th the *Teutonia* put into Dover and there remained.

It was proved that not only were the master and owner of the *Teutonia* Prussian subjects, as admitted by the pleadings, but that her crew also were Prussian subjects.

Evidence was given to shew that nitrate of soda, though used for agricultural purposes, might be used for manufacturing gunpowder; and that its market value was increased on the breaking out of the war.

In order to prove the relations existing between France and Prussia at the time of the breaches complained of, Mr. Von Schmidthals, the secretary to the German Legation in London, was called as a witness for the defendant. He produced a telegram from the Prussian minister, Count Bismarck, to the Prussian ambassador in London. This telegram was objected to by the plaintiff's counsel, but it was admitted in evidence by the judge.

It was as follows:—

Berlin, 16*th July*, 1870.
1.45, A.M.

In consequence of news of the open declaration made this day by the French minister, which declaration appears to be equal to a declaration of war, the mobilization of the whole of the North German Army has been ordered, and a request has been addressed to the governments of North Germany to place their forces on a war footing.

Mr. Von Schmidthals stated that this telegram was communicated to the Prussian consul-general in London and to the Prussian consul at Dover. He also stated, on cross-examination, that the French declaration of war was delivered to the Prussian government at Berlin on the 19th of July.

The printed "Correspondence respecting the negotiations preliminary to the war between France and Prussia, presented to

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both Houses of Parliament by command of Her Majesty (1)," was tendered in evidence on behalf of the defendant and objected to on behalf of the plaintiffs. It was admitted by the judge.

The following are extracts from the chief documents which bear upon the case:—

Lord Lyons to Her Majesty's Principal Secretary of State.

Paris, July 5, 1870.

(Extract.)

The Duc de Gramont told me this afternoon that the French government had received positive intelligence that the crown of Spain had been offered by General Prim to Prince Leopold of Hohenzollern, and has been accepted by the prince.

"To this," continued M. de Gramont, "France will not resign herself; and when I say that we shall not resign ourselves to it, I mean that we shall not permit it, and that we shall use our whole strength to prevent it."

M. de Gramont then informed me that he had declared categorically to Baron de Werther, the Prussian Ambassador, that France would not tolerate the establishment of the Prince de Hohenzollern or any other Prussian prince on the throne of Spain.

Lord Lyons to Earl Granville.

Paris, July 8, 1870.

(Extract.)

M. de Gramont went on to say that he was still without any answer from Prussia, and that this silence rendered it impossible for the French government to abstain any longer from making military preparations. Some steps in this direction had been already taken, and to-morrow the military authorities must begin in earnest.

Lord Lyons to Earl Granville.

Paris, July 15, 1870.

I have the honour to enclose, extracted from the newspaper *La France*, published this evening, the substance of the declaration made this day in the Senate by the Duc de Gramont, and in the Corps Législatif by M. Emile Ollivier, on the relations between France and Prussia.

(The extract enclosed was in substance the same as the report enclosed in the despatch which follows.)

Lord Lyons to Earl Granville.

Paris, July 16, 1870.

(Extract.)

I have now the honour to transmit to your lordship the authentic reports of the proceedings in both chambers, taken from the *Journal Officiel* of this morning.

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(1) The correspondence is contained in three blue books. Correspondence C., 167; Further Correspondence, No. 2, 1870, C., 189; Further Correspondence, No. 1, 1871, C., 244.

(Inclosure. Translation.)

From the *Journal Officiel* of July 16, 1870.

The Minister for Foreign Affairs :—

We were accordingly profoundly impressed when we learnt yesterday that the King of Prussia had notified by an aide-de-camp to our ambassador that he would not receive him any more, and that in order to give this refusal an unequivocal character, his government had communicated it officially to the Cabinets of Europe. We learnt at the same time that Baron Werther had received orders to go on leave, and that armaments were being effected in Prussia.

Under these circumstances a further attempt at conciliation would be a forgetfulness of dignity and an imprudence. We have neglected nothing to avoid a war; we are about to prepare to sustain one which is offered to us—leaving to each the share of responsibility which belongs to them.

Since yesterday we have called in our reserves, and, with your assistance, we are about immediately to take the measures necessary to secure the interest, the safety, and the honour of France.

Earl Granville to Lord Lyons.

Foreign Office, July 16, 1870.

(Extract.)

Her Majesty's government cannot doubt that the principles recorded in the Declaration of Paris, of the 16th of April, 1856, will be scrupulously acted on by the belligerents in the present war; but the Imperial government may, perhaps, be disposed formally to announce that, for its part, they will form the rule of its conduct in the prosecution of hostile operations by sea.

I address a communication to the same effect to the government of Prussia.

Earl Granville to Lord Lyons.

Foreign Office, July 16, 1870.

The French ambassador called upon me to-day and acquainted me that the Imperial government intended, on breaking off relations with North Germany, to place French subjects in the North German Confederation under the protection of the British ambassador, ministers, and consuls.

I informed M. de Lavalette that Her Majesty's government, being happy to do any friendly office to the government of the Emperor, would readily assent to their wishes in this respect, reserving to themselves to do the same in France as regards German subjects if required to do so by the North German Confederation.

Lord Lyons to Earl Granville.

Paris, July 18, 1870.

The Duc de Gramont told me this afternoon that he sent yesterday a formal declaration of war against Prussia to Berlin by one of the secretaries of the French Embassy there who happened to be at Paris on leave. He added that he only waited to hear of the declaration being read at Berlin, to notify it to the Prussian Chargé d'Affaires at Paris, and publish it.

Lord Lyons to Earl Granville.

Paris, July 21, 1870.

(Extract.)

In answer to the request for early notice of the declaration of war, M. de

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Gramont sends me a copy of the announcement made by him to the Chambers yesterday.

The substance of the announcement was conveyed to your lordship yesterday by my telegram. . . . . The *Journal Officiel* of this morning accordingly contains a notice on the subject of Prussian residents in France and her dependencies, and of merchant vessels. . . . . I have now the honour to inclose copies of the whole notice.

(Inclosure.)

Declaration made to the Senate and to the Corps Législatif in the sitting of July 20th, 1870, (communicated to Earl Granville by the Marquis de Lavalette, July 22.)

(Translation. Extract.)

According to usage, and by order of the Emperor, I have invited the Chargé d'Affaires of France to notify to the Cabinet of Berlin our resolution to seek by arms the guarantees we have failed in obtaining by discussion. This step has been taken, and I have the honour to announce to the Senate and the Corps Législatif, that in consequence a state of war exists from the 19th of July, between France and Prussia.

(Inclosure.)

Extract from the *Journal Officiel* of July 21, 1870.

(Translation.)

As concerns merchant vessels belonging to the enemy which may be actually in the ports of the empire, or who may enter those ports in ignorance of the state of war, His Majesty has been pleased to order that they shall have a delay of thirty days for leaving these ports. Safe conducts shall be delivered to them to enable them to return freely to their ports of despatch, or to the port of destination.

A telegram from Count Bernstoff, the Prussian ambassador in London, to the Prussian consul at Dover, which was received at Dover on the 23rd of July, was put in evidence. It was as follows:—

From Bernstoff to North German Vice-Consul, Dover. Try immediately to prevent North German ship *Teutonia*, Captain Köster, from going to Dunkirk.

After the *Teutonia* put into Dover, and after the declaration of war, the plaintiffs demanded of her master the delivery of the goods, but they made no definite offer to pay any sum for the carriage of the goods from Pisagua, and the master refused to comply with their demand. The result of the evidence with reference to the negotiations for the delivery of the goods appears from the judgment.

Butt, Q.C., and *E. C. Clarkson*, for the plaintiffs. It is admitted that by the law of Prussia it is unlawful for a Prussian subject to trade to the port of an enemy, and if war had actually broken out

between France and Prussia at the time the master of the *Teutonia* refused to proceed to Dunkirk, his refusal would have been justifiable. From the moment the orders were given and accepted to proceed to Dunkirk, the parties were in the same position as if Dunkirk had been the only port named in the charter and bill of lading. The *Teutonia* arrived off Dunkirk on the 16th of July, and the next day she might have entered the port. If she had entered the port on that day she could have discharged her cargo, for she would have been entitled to the immunity granted by the proclamation published on the 21st of July. But instead of entering the port, the ship, on the 16th, proceeded to the Downs and there anchored, and on the 18th her master, in accordance with instructions from his owners, refused to proceed to Dunkirk and put into Dover. There was no declaration of war until the 20th, when war was formally declared by the French government as from the 19th. Before the existence of a state of war there were, therefore, two distinct breaches of the contract, one on the 16th and one on the 18th. The fact that for some days before the declaration of war it was probable that war would soon be declared, cannot avail the defendant, because a man is not excused from performing his contract by the happening of unexpected events, unless they are of such a nature as to render the performance of the contract illegal: and until a state of war actually existed, the performance of the contract was not illegal: *Paradine* v. *Jane* (1); *Barker* v. *Hodgson* (2); *Hall* v. *Wright*. (3) It may be contended on the other side that although the master was not entitled to refuse to perform his contract before the breaking out of the war, yet that when war was imminent he was justified in pausing, and to support this contention, *Pole* v. *Cetcovich* (4) may be relied on. But that case does not really bear upon the point. On the other hand, *Atkinson* v. *Ritchie* (5) is a direct authority to shew that a reasonable and well-grounded apprehension of a hostile act on the part of a foreign power does not excuse a breach of contract. But the facts shew that the defendant did more than merely pause; on the 18th the owners of the *Teutonia* ordered the master not to go

(1) Aleyn, 26.
(2) 3 M. & S. 267.
(3) E. B. & E. 765; 29 L. J. (Q.B.) 43.
(4) 9 C. B. (N.S.) 430; 30 L. J. (C.P.) 102.
(5) 10 East, 530.

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to Dunkirk, and the master obeyed those orders without communicating with the charterers: there was, therefore, on that day an absolute refusal to perform the contract. If war had not broken out on the 19th or afterwards, it is clear that the breach on the 18th could not have been justified; subsequent events cannot justify an act which was not justifiable at the time it was done. After the war had broken out the master of the *Teutonia* was guilty of a breach of duty in refusing to deliver the goods to the plaintiffs. As soon as the war broke out the contract was rescinded, and the parties were in the same position as if no contract had been made: *Esposito* v. *Bowden* (1); *Reid* v. *Hoskins*. (2) The master was bound to deliver up the cargo; it was not incumbent upon the plaintiffs to make any offer to pay any sum of money by way of freight, and the master had no right to demand any such payment, or to impose any terms whatever: *Osgood* v. *Groning*. (3) There is no evidence of any implied contract to pay pro ratâ freight.

Milward, Q.C., and *Cohen*, for the defendant. The first point to be ascertained is, when did the war break out? The French government published a declaration of war on the 20th, declaring war as from the 19th. But a state of war existed before the 19th. A state of war may exist independently of and prior to a declaration of war: *The Nayade* (4); Phillimore's Commentaries on International Law, vol. 3, c. v. li.; *The Ariel*. (5) It is clear that the duties of Prussian subjects towards their own state could not in any way be affected by the French proclamation, and the question in the present case is, could the defendant or his master and crew have carried out the contract consistently with the obligations imposed upon them by the laws of their own country: *Potts* v. *Bell* (6); *Esposito* v. *Bowden*. (1) It is contended that a state of war existed on the 16th, certainly it existed on the 18th. If a state of war did not actually exist on the 16th war was then imminent, and the state of affairs was such as to justify the master of the *Teutonia* in proceeding to Dover to make inquiries. Prior to the 18th there was no breach of the contract, there was nothing more than a

(1) 4 E. & B. 963; 7 E. & B. 763; 24 L. J. (Q.B.) 210; 27 L. J. (Q.B.) 17.
(2) 6 E. & B. 953; 26 L. J. (Q.B.) 5.
(3) 2 Camp. 466.
(4) 4 Rob. 251.
(5) 11 Moo. P. C. 119–129.
(6) 8 T. R. 548.

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deviation, and under the circumstances the deviation was justifiable. A deviation is not actionable unless it is made without sufficient cause or excuse: *Davis* v. *Garrett.* (1) A reasonable fear of capture by the French would justify delay or deviation: (see the judgment of Byles, J., in *Pole* v. *Cetcovich* (2)); and the acts of the master on the 16th must be judged of without reference to the proclamation which was issued by the French government on the 21st. The defendants committed no breach in refusing to go to Dunkirk, because Dunkirk was not a safe port: *Ogden* v. *Graham* (3), and the plaintiffs did not name any other port. The contract was a contract to proceed to Falmouth for orders, and thence to any one safe port within the limits mentioned in the charterparty.

It was the act of the plaintiffs in persisting in naming Dunkirk only that rendered the performance of the contract impossible. The performance of the contract was prevented or dispensed with by the act of the plaintiffs, and in such a case the shipowner is entitled to refuse to deliver up the goods without payment of full freight, though the contract may not have been performed: Maclachlan on Shipping, pp. 405–407, *Shield* v. *Wilkins* (4), *Tindall* v. *Taylor.* (5)

But even if the contract was dissolved by the war, it is still contended that the defendant was entitled to refuse to deliver up the goods without compensation for the carriage of the goods from Pisagua. The law does not dissolve the contract ab initio. It treats the contract as put an end to, because by reason of supervening events it has been impossible of performance; but it does not regard as void what was done under the contract before the events happened which rendered the further performance impossible. If at the time the contract is put an end to by operation of law, one of the parties to the contract has derived a benefit from the part performance of the contract by the other, the law will imply a promise by the party who has received the benefit to pay for the benefit so received. If it is an implied term in every con-

(1) 6 Bing. 716.
(2) 9 C. B. (N.S.) 430; 30 L. J. (C.P.) 102.
(3) 1 B. & S. 773; 31 L. J. (Q.B.) 26.
(4) 5 Ex. 304; 19 L. J. (Ex.) 238.
(5) 4 E. & B. 219; 24 L. J. (Q.B.) 12.

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tract, that if the performance of the contract becomes illegal by reason of subsequent events, the parties shall be freed from their obligation, it is not unreasonable to regard it as an implied term also, that if at the time the parties are freed from their obligation under the contract, one of the parties has received the benefit of something done under the contract, he shall pay for the benefit he has actually received.

The rule applied in *Cutter* v. *Powell* (1) only applies in cases where the contract is open and unrescinded. If the plaintiff's contention be right, the contract was rescinded on the 19th of July. When the plaintiffs demanded their goods at Dover they elected to treat the contract as rescinded, and claimed the benefit of the carriage of the goods to Dover, and this they could not do without placing themselves under an obligation to pay for the benefit they claimed.

Clarkson, in reply.

Cur. adv. vult.

March 28. SIR ROBERT PHILLIMORE. This is a cause instituted under the 6th section of the "Admiralty Court Act, 1861, on behalf of Messrs. Duncan, Fox, and Co., of Liverpool, the consignees of a bill of lading of cargo laden on board the ship *Teutonia* against that ship and her freight, and against Daniel August Köster of Hamelwörden, a merchant and the owner of the said vessel. The plaintiffs pray that the ship and freight (if any) may be condemned in damages for breach of duty or breach of contract. The *Teutonia* was a German or Prussian brig, subject to the laws of Prussia, and her master and crew were subjects of the King of Prussia. In the month of April, 1870, she was lying in the port of Pisagua. On the 1st of February her master had entered into a charterparty with Messrs. Sawers, Duncan, & Co. (a branch at Valparaiso of the Liverpool firm, who are the suitors in this court) by which he undertook that the brig should proceed to the port of Iquique, where and or at one adjacent by-port she should receive and take on board a full and complete cargo of nitrate of soda in bags, and should proceed either to Cork, Cowes, or Falmouth, at the option of the master, where she should receive orders from charterers'

(1) 2 Sm. L. C. 1.

agents within three days after arrival to proceed to any one safe port in Great Britain or on the Continent between Havre and Hamburg, both included, and there, according to bills of lading and charterparty deliver the cargo. [The learned judge here read the provisions of the charterparty set out above.]

The bill of lading, dated the 5th of April, was as follows:—[The learned judge here read the bill of lading set out above.]

It appears from the evidence taken before me that the cargo of nitrate of soda, though used for agricultural purposes, is an ingredient which may be used in the manufacture of gunpowder, and that the prospect of war would raise the price of it in the market, but that no report of any war between France and Prussia had reached the Valparaiso firm at the time when this article was put on board the *Teutonia*. The brig arrived at Falmouth on the 10th of July, and there on the 11th of July received orders to take the cargo to Dunkirk; she arrived at a distance of about fourteen miles off that port at twelve o'clock at night of the 16th, which was a Saturday; and the master says that after lying-to for about two hours, a regular pilot in official uniform came on board; that he (the master) asked the pilot about the war of which he had heard rumours at Falmouth; that the pilot told him it had been declared two days ago; that he asked the pilot where he could bring him in safety, so that he might ascertain whether war was declared or not; that the pilot offered to take him to Flushing, or the Downs, or wherever he liked. According to the evidence there would not have been water enough for the *Teutonia* to have entered the port of Dunkirk till after four o'clock on the evening of the 17th. It is not unimportant to observe that she could not have entered that port before that time.

The master elected to go to the Downs, and he anchored there on Sunday morning, the 17th, at ten o'clock. He says that on that day he could obtain no advice or information; that on the Monday the 18th he telegraphed to the owner (who was his father), and received an answer forbidding him (this came out on cross-examination) to go to Dunkirk; and that on Tuesday the 19th he took the ship into Dover as the nearest and safest place; he added that he did not go to Dunkirk because war had broken out, being afraid for the safety of his ship, himself and his crew in a French port,

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and also being afraid of punishment when he returned to his own country. On the Monday he was on shore at Deal, and the German consul told him that war had broken out.

Upon this state of facts the first question of law is raised in this case. It is averred by the plaintiffs that the master made default in obeying the proper orders given to him, and that on this account the owners of the ship are liable in damages. In answer to this the defendants have pleaded the facts alleged in articles 3 and 3A of the answer as amended. [The learned judge here read art. 3 and art. 3A of the answer, and art. 2c of the reply.]

It was admitted during the course of the argument by the counsel for the plaintiff, that on and after the 19th, the date of the formal declaration of war by the French government, the *Teutonia* was not bound to carry cargo to Dunkirk, I am therefore relieved from the necessity of considering whether any relaxations of the strict laws of war by the order of the French government after or at the same time with the declaration of war would affect this case. It was proved, as I have already stated, that the *Teutonia* could not have entered that port before the afternoon of the 17th: the charge against her, therefore, of making default in delivery of the cargo is narrowed in point of time to the period elapsing between the afternoon of the 17th and the morning of the 19th; it is during this interval that the *utile tempus* occurred during which it is maintained that she ought to have delivered her cargo at Dunkirk. It is argued that two distinct breaches of contract took place during this interval: the first breach is, the not going into Dunkirk on the 17th; the second, in not returning from Dover to Dunkirk on the 18th. As it seems to me that no substantial distinction exists as to the principle of law upon which these two breaches are charged, I shall endeavour to deal with them together, and not separately. It must be remembered that the *Teutonia* is a Prussian ship, subject to Prussian municipal law, as well as to general international law; and it has been admitted before me that, though no formal proof of the Prussian law has been given in evidence, it may be assumed that the maxim that a ship trading with the enemy of the state to which she belongs incurs the severest penalties, is a part of that law.

The principal contention of the plaintiffs upon this part of the

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case has been, that war between France and Prussia was not declared until the 19th: but I think there can be no doubt that war may exist de facto so as to affect at least the subjects of the belligerent state, either without a declaration on either side, or before a declaration, or with a unilateral declaration only. This is a position fortified by the opinions of great international jurists down to the judgments of Lord Stowell in our own time: *The Nayade* (1); *The Eliza Ann* (2); as well as by historical precedents relating both to foreign countries and to our own during the last century. To take only one instance, when in 1761, in a negotiation which preceded the close of one of the most memorable wars which England ever waged, France demanded, "that captures *before* the declaration, *except king's ships*, should be restored, or a recompense made, because taken contrary to the law of nations," it was replied on behalf of England that "the demand of restitution of captures before the war cannot be admitted, for it is not founded upon any particular convention, nor yet resulting from the law of nations; for the right of hostilities does not result from a formal declaration of war, but from the hostilities which the aggressor first offered:" Ann. Reg. (1761) vol. iv. p. 260, art. xi. p. 262, art. 10; Phillimore's Int. Law. vol. iii. p. 87. In 1854 the British declaration of war against Russia was not issued till the 29th March, but the Russian ambassador left England on the 8th February.

It is notorious that the relations between France and Prussia had been seriously disturbed from the 5th of July. On that day Lord Lyons wrote to the government of this country that the French government had learned that the crown of Spain had been offered to and accepted by Prince Leopold of Hohenzollern, and that they had signified to the Prussian ambassador that they would not permit the establishment of any Prussian prince upon the throne of Spain. On the 8th of July it was communicated from the same quarter to the British government that the French government found it impossible to refrain any longer from making military preparations; and at the time when the *Teutonia* arrived at Falmouth, namely, on the 10th, the apparent imminence of war was such as to alarm all Europe, and must have been per-

(1) 4 Rob. 251, 253. (2) 1 Dod. 244, 247.

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fectly well known to the plaintiffs when they ordered this vessel to sail for Dunkirk, where the market for her cargo would, as the evidence shews, be raised by the probability of its being used for the manufacture of gunpowder.

On the 15th of July it was publicly announced in the French newspapers that the French government had made a formal declaration, both in the Corps Législatif and in the Senate, that the Prussian ambassador had been told to demand his passport; that further attempts at conciliation were impossible. "Nous n'avons rien négligé pour eviter une guerre, nous allons nous préparer à celle qu'on nous offre."

On the 16th of July Lord Granville telegraphed to Lord Lyons: "The mercantile people in this country are anxious to know whether neutral vessels will be allowed by the belligerent powers to sail to and from French and German ports with cargoes for a specified time. Many ships, I am informed, are now loading in British ports for ports in both countries. Ascertain this point without delay." On the same day Lord Granville wrote to Lord Lyons: "Her Majesty's government cannot doubt that the principles recorded in the Declaration of Paris of the 16th of April, 1856, will be scrupulously acted on by the belligerents in the present war; but the imperial government may, perhaps, be disposed formally to announce that, for its part, they will form the rule of its conduct in the prosecution of hostile operations by sea."

On the same date Lord Granville wrote that the French ambassador had called upon him, and said that his government "intended on breaking off relations with North Germany, to place French subjects in the North German Confederation under the protection of the British ambassador, ministers, and consuls."

For these facts I have hitherto relied upon the correspondence presented to both Houses of Parliament by command of Her Majesty. I now advert to the telegram of the Prussian minister, Count Bismarck, to the Prussian ambassador at London, which was put in evidence before me. [The learned judge here read the telegram set out above.]

It appears from the evidence of Mr. Von Schmidthals that he telegraphed this intelligence to the Prussian consul at Dover on

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the 16th of July, and communicated it the same day to the Prussian consul-general in London. On the same date the French newspaper, the *Journal Officiel*, contained the statement made on the 15th of July by the French government to the Senate as to the preparations for war.

In this state of facts, I am of opinion that the *Teutonia* would have incurred a double risk in proceeding to Dunkirk; she would have been exposed to the peril of being seized by a French cruiser on the ground of her Prussian nationality, and of being seized by a Prussian cruiser on the ground of her trading with and carrying contraband of war to the enemy. The information which the pilot gave her off Dunkirk was substantially correct. War had, in fact, broken out, or was so imminent as to render Dunkirk an *unsafe port* for a Prussian vessel. In the case of *The Ariel* (1), decided by the Privy Council in 1857, their Lordships said: "It is argued that war cannot be said to be imminent unless there be an embargo, or some similar act of the country about to be belligerent, and cases are cited in which such circumstances have occurred, but none of those cases go the length of laying down any positive rule as to the necessity of such circumstances."

The old case of *Paradine* v. *Jane* (2), and others founded upon the principle therein contained, have been cited to me as authorities for the contention that the *Teutonia* was guilty of a breach of contract in not proceeding to Dunkirk even in the circumstances which I have stated. The propositions of law in *Paradine* v. *Jane* (2) are, "where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him. . . . . But when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." But assuming that this is at present a correct exposition of the law of England (though the last proposition is, I think, not in harmony with the jurisprudence of any other European state), it does not seem to me to affect this case. Indeed it has not been denied that, if the

(1) 11 Moo. P. C. at p. 129; 3 Phillimore's Int. Law, p. xlvii. add.

(2) Aleyn, 26.

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contract has become illegal in virtue of a law subsequent to it, the non-execution of the contract is no breach. Item: quod leges fieri prohibent, si perpetuam causam servaturum est, cessat obligatio: Dig. Lib. xlv. tit. i. s. 35. This doctrine of the civil law is also laid down by Lord Ellenborough in the case of *Atkinson* v. *Ritchie* (1): "Neither can it," he says, "be questioned that if from a change in the political relations and circumstances of this country, with reference to any other contracts which were fairly and lawfully made at the time, they have become incapable of being any longer carried into effect without derogating from the clear public duty which a British subject owes to his sovereign and the state of which he is a member, the non-performance of a contract in a state so circumstanced is not only excusable, but a matter of peremptory duty and obligation on the part of the subject. But in order to found this new public duty, which is to supersede the performance of his former private one, it is necessary that an actual change in the political relations of the two countries should have taken place; and that the danger to result to the public interests of his own country from an observance of the contract should be clear, immediate, and certain. In short, such a state of circumstances must be shewn to exist as that the contract is no longer capable of being performed by him without a criminal compromise of his public duty. Can anything of this kind," he continues, "be said with truth to exist in the present case? No actual change in the political relations of Great Britain and Russia had then taken place. The danger to result from remaining at Cronstadt was neither immediate or certain: in point of fact it attached only at the distance of many weeks afterwards. And no one can venture to suggest, even in argument, that the loading in question might not have been completed without any criminal compromise of public duty."

This was a case in which the impediment to the fulfilment of the contract was the apprehension of an embargo, the future effect of which is always doubtful, and to which considerations apply other than those which apply to a state of actual war, the end of which cannot be foreseen; whereas, an ordinary embargo imposes only a temporary restraint upon the performance of the contract.

(1) 10 East, 530, at p. 534.

An embargo is an act, as Lord Stowell says, hostile enough in the mere execution, but equivocal as to its effects, and liable to be varied by subsequent events, and by the conduct of the government, the property of whose subjects is so detained: *The Boedes Lust.* (1) But when an embargo is imposed by the government of the country of which the merchant is a subject in the nature of reprisals and partial hostility against the country to which the ship belongs, the merchant, it is laid down by Lord Tenterden, may put an end to the contract if the object of the voyage is likely to be defeated by the delay. (2)

In the subsequent case of *Barker* v. *Hodgson* (3), Lord Ellenborough said: "If, indeed, the performance of this covenant had been rendered unlawful by the government of this country, the contract would have been dissolved on both sides; and this defendant, inasmuch as he had been thus compelled to abandon his contract, would have been excused for the non-performance of it and not liable to damages."

These and other cases were fully reviewed and confirmed in the more recent judgment of the Exchequer Chamber in the case of *Esposito* v. *Bowden* (1857) (4). In that case Mr. Justice Willes said: "The principal question in the case is, as to the validity of the plea. It is in effect, whether a charterparty made before the late Russian war between an English merchant and a neutral shipowner, whereby it was agreed that the neutral vessel should proceed to Odessa, a port of Russia, and there load from the freighter's factors a complete cargo of wheat seed or other grain, and proceed therewith to Falmouth with usual provisions as to laying days and demurrage, was dissolved by the war between England and Russia, —alleged by the charterer, in his plea, which is to be taken as true for the purpose of the present discussion, to have broken out before the vessel arrived at Odessa, and to have continued up to and during the time when the loading was to have taken place; it being further alleged, in the plea, that from the time war was declared it became and was impossible for the charterer to perform his agreement without dealing and trading with the Queen's

(1) 5 Rob. 233, at p. 245.

(2) Abbott on Shipping, p. 430, 5th ed.; p. 456, 11th ed.

(3) 3 M. & S. 267, at p. 270.

(4) 7 E. & B. 763; 27 L. J. (Q.B.) 17.

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enemies." The Court, reversing the sentence of the Queen's Bench, held the plea to be valid. Mr. Justice Willes concludes the judgment in these words:—"The plea alleges that the contract could not have been fulfilled without such dealing and trade. That, as we have already shewn upon grounds not considered in the judgment of the Court of Queen's Bench, may be true. If it may, then, inasmuch as the law justifies what it commands, and effects that purpose, in cases like the present, by dissolving contracts which presumably cannot be executed without dealing and trading with the enemy, the plea is sufficient."

In the case before me the law of France, the state to which the port belonged, did not, it is true, prevent the unloading at Dunkirk; but the law of Prussia, the state to which the ship belonged, prevented it. The contract was no longer capable of being performed by the master "without (to use the phrase of Lord Ellenborough) "a criminal compromise of public duty;" for I think it might be reasonably maintained that the prohibition was as stringent in the one case as the other, and that the same legal consequences flow from either state of things. I think that on the 16th of July the *Teutonia* could not have entered Dunkirk with her cargo without being exposed to the penalties of trading with the enemies of her country. But if this be an erroneous application of the law to the facts at this date, the next question which arises is whether the circumstances did not justify her in pausing and making further inquiries before she entered the port. I am of opinion that they did justify her in so doing, and that she was entitled to take reasonable measures within a reasonable time for this purpose. The law would be most unreasonable, I think, if it considered such a cause to be a breach of contract; and I derive confirmation of my opinion on this point from the judgment of the Common Pleas in the case of *Pole* v. *Cetcovich* (1).

Now, what were the steps taken by the master of the *Teutonia*? He goes back to the Downs on the 17th, which was a Sunday, and when he says he could obtain no advice or information. On Monday, the 18th, he telegraphed to his owner, and was ordered not to go to Dunkirk; and on the 19th he went into Dover, on which day, as I have already said, it is admitted that the law prevented

(1) 9 C. B. (N.S.) 430; 30 L. J. (C.P.) 102.

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him from executing his contract. It is said that he did not communicate with the charterers, but I am unable to see how any communication from them could, having regard to the facts and dates which I have already mentioned, have required him to go to Dunkirk on the 18th, or even on the 17th, if he could have communicated with them on that day. I must add, that the telegram which was received at Dover on the 23rd shews that the master had probably not taken a wrong view of his duty to his own country. It was as follows:—"From Bernstoff to North German Vice-Consul, Dover. Try immediately to prevent North German ship *Teutonia*, Captain Köster, from going to Dunkirk." I am of opinion that the master of the *Teutonia* was entitled to pause and take a reasonable time for making further inquiries as to the existing relations between his own country and France, and that he did not exceed the limits of a reasonable time in making the inquiry; and after the inquiry had been made, it is admitted that the contract could not, on account of the war, be executed.

I now come to the second branch of the case, namely, whether the owner of the ship is liable in damages because the master did not deliver the goods to the plaintiffs at Dover. It appears from the evidence that various attempts at negotiations on this subject passed between the master and the charterers, but that on the part of the charterers it never assumed the shape of a definite offer of pro ratâ freight, and that, on the part of the owner, the master offered, on the 24th of July, to deliver the cargo on payment of freight and receipt of an indemnity against all consequences of not proceeding on the voyage; and, on the 1st of August, he offered to remit so much of the freight as would equal his expenses at Dunkirk, somewhere about £50, or to take the cargo to London for the same freight as to Dunkirk. On the same day the charterers proposed to tranship the cargo on billyboys, if the master would pay the expenses, and he refused. It does not appear that the charterers required him to proceed to any port mentioned in the charterparty, except Dunkirk, at any time.

The question of law arising on these facts is, whether the master was bound to deliver the cargo without any payment in respect of freight. The general rule that freight is due only

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where the goods are delivered at the port of destination is subject to exceptions or modifications; and these exceptions or modifications may arise out of the terms of an express contract, out of an implied contract, or out of the equity between the parties. The law of England, as administered in the Courts of Common Law, requires the master to carry the goods to the place of destination, unless prevented by an unavoidable casualty, and requires the merchant, if the goods be so delivered, to pay the stipulated freight. If the ship be disabled from completing her voyage the master may still earn the whole freight, by making within reasonable time the necessary repairs to the ship, or by sending the goods in another ship to the place of their destination; but if he decline to do this, the merchant is entitled to take the goods without payment of freight, the contract not having been performed; on the other hand, if the merchant refuse to allow the reasonable time for repairs, or the transmission of the goods by another ship, and demands his goods at once, he must pay the whole freight, having prevented the performance of the contract. But if the ship be, by inevitable necessity, forced into a port short of her destination, and is unable to prosecute her voyage, and if the merchant voluntarily accepts the goods at that port, he must pay a pro ratâ freight. The cases in which this principle is laid down are those in which a physical impossibility has prevented the execution of the contract. But where a moral or legal impossibility supervenes the contract is dissolved. Here the law of England and the general law are in harmony. Donellus says, "Placet casus fortuitos, nullo bonæ fidei, judicio itemque a nemine præstari. (1) . . . . Casus fortuitus a nostris definitur, casus qui prævideri non potest, aut cui præviso resisti non potest:" (2) and here the maxim of the Roman law, "Nemo tenetur ad impossibilia," derived from common sense and natural equity, is adopted and applied by the law of England.

It has, however, been argued that the contract was dissolved by the supervening circumstance of the war, and that the consequence from this premiss is, that the merchant had a right to take his goods out of the ship without payment of any freight at Dover. I do not scruple to say that if such be the law it appears to me at

(1) Donellus De Jure Civili, Lib. xvi. cap. 6, s. 11. (2) Ibid. s. 12.

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variance with evident justice. But I do not find any case which goes the length of saying that where a supervening moral impossibility, arising out of the prohibition imposed by a law not applicable, or not existing at the time of the making of the contract, has prevented its fulfilment, the merchant is entitled to have his goods carried by the ship, almost, as in this case, the whole length of the voyage without any compensation to the shipowner.

I find no authority for the position that the contract is dissolved in the sense of rendering null all that has been previously done under it, though it is dissolved as to all future consequences. The law, as Mr. Justice Willes says, justifies what it commands; if, on the one hand, it commands, in these circumstances, the dissolution of the contract, does it not, on the other hand, justify the command by placing the parties as nearly as possible in statu quo ante contractum? does it give to one party, both being equally innocent, a manifest advantage over the other? does it say to the merchant, "You shall receive your goods greatly enhanced in value by their having been carried across the ocean, within the neighbourhood of the place of destination, without any remuneration to the owner of the vehicle which has conveyed them"?

This may be the doctrine of the common law where a physical unexpected obstacle, which might have been guarded against in the contract, prevents the completion of it, but in this instance the completion is prevented by the act of the law itself. Moreover, in the present case, the merchant has, at the port of call, selected, out of several ports named in the charterparty, one to which access has became morally or legally impossible. Has the merchant, being apprised of this fact, not choosing to mention himself any other port, and not making any tender of partial freight, but receiving an offer from the master to take the goods to one of the other ports mentioned in the charterparty which did not belong to a belligerent, and was not far distant, a right to refuse this offer; and by the refusal to escape the payment of all freight for the goods which he demands? I think not. But if such were, which I greatly doubt, the law to be administered in a Court of Common Law, dealing with the subject exclusively on the narrow footing of a special contract express or implied, and not upon the general principles of legal obligations of which, according to the civil law,

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contract is a branch, it would not necessarily be the law administered by a court of equity or by the Admiralty Court. In the case of *Osgood* v. *Groning* (1) an American ship, the *Neptune*, in the year 1807, being under a charterparty bound to Rotterdam, refused (the earlier history of the case is immaterial) to go there, being apprehensive of confiscation under the French decree then in force; and her master offered to deliver up her cargo on being paid freight and charges to the agents of the charterers in London. They refused to receive it, and required him to complete his voyage according to the charterparty. The master proceeding to sell the cargo was restrained by an interim injunction of the Court of Chancery. The Lord Chancellor then directed two questions to be tried in a court of law: first, whether the master was entitled to any and what sum of money for freight on this cargo; and secondly, whether he was entitled to any and what sum of money by way of compensation for the carriage of the goods from Charlestown to London. Lord Ellenborough tried the case, and "is reported"—to use Lord Tenterden's cautious phrase—to have said "that the shipowner had no claim for freight, the goods being brought short of their destination, and there being no express contract for compensation in this event, and no implied contract, as there had been no acceptance of the goods to found a promise to pay pro ratâ itineris." Lord Tenterden proceeds to remark that "the Lord Chancellor afterwards directed the second question to be tried again in a court of law, and ordered the merchant to admit that he had accepted the goods in the port of London, if it should appear that the master could not reasonably have been required to proceed on the voyage; considering that if the master could not reasonably have been required the merchant ought to have accepted the goods, and his refusal to accept them was an act against conscience and a proper subject for the jurisdiction of a court of equity, which on many occasions places parties in the situation in which they would stand if that which ought to have been had been actually done." The principle of this equity seems to have been adopted by my predecessor, in the case of *The Soblomsten* (2), to which, I think, my attention was not drawn during the argument. The same princi-

(1) 2 Camp. 466; Abbott on Shipping, 10th ed. 344, 345.

(2) Law Rep. 1 A. & E. 293.

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ple, as might be expected in a jurisprudence founded on the civil law, seems to have governed the following case in the courts of Scotland. In the case of *Wilson* v. *Bennett* (1), a ship freighted with grain on a voyage from Dundee to Bridport, was stranded off Portland Island. The shippers abandoned the cargo to the underwriters, who took delivery of the greater part of it and had it sold. The master did not claim his lien for freight; but an action was afterwards brought against the shippers. The Judge-Admiral decreed for "such proportion of the stipulated freight as shall correspond to the part of the voyage performed, and the quantity of grain received . . . in respect that the master, where the partial non-fulfilment of the contract does not arise from any fault on his part, is entitled to such proportion of the freight as may correspond to the part of the stipulated voyage, which the vessel has performed, and to the quantity of goods delivered, though not at the port of destination. . . . Affirmed in the Court of Session:" Bell's Commentaries, edited by McLaren, book 3, p. 1, c. 4. (2)

Lord Tenterden, in his chapter on Freight (p. 346, 10th ed.) observes, "The authority of the Court of Admiralty being exercised upon the ship and cargo in specie, or (which is in effect the same thing) upon the proceeds of a sale made under its own decree, is very different from that of a court of common law," and he cites the following case, the judgment in which, on account of its importance, I will state at length. Lord Stowell, in the case of *The Friends* (3) said, "This was a case of a British vessel, which had been chartered at Campeachy for the purpose of delivering a cargo at Lisbon. The ship had successfully prosecuted her voyage to the very entrance of the Tagus, when she was warned off by the blockading squadron. Upon receiving this information, she continued for some days with the fleet, but a gale coming on which blew her out to sea, she was picked up by a Spanish privateer, and was soon afterwards retaken by a British cruiser and carried to Madeira, where the ship and cargo were sold by the re-captors to pay the salvage. A claim has since been given for the ship and cargo, which was decreed to be restored, and the Court has now

(1) 15 Faculty Coll. 251, decided March 10, 1809.

(2) Vol. i. div. 2, p. 618.

(3) Edwards, 246.

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to consider what freight is due under the circumstances of the case. On the part of the owner of the ship, it is contended that the whole of the freight is due, as the ship had actually gone up to the mouth of the port to which she was destined. On the part of the owner of the cargo it is contended, that no freight is due, as the cargo was not delivered according to the terms of the charterparty. Several cases from the courts of common law have been cited, but I confess it does not appear to me that any principle is to be extracted from them that is applicable to the present question, although I should have thought that some cases of British ships which had come up to the very port of their destination, and were prevented from discharging their cargoes there, by the act of the sovereign authority of their own country, must have occurred in those courts, among the multiplicity of cases which the present extended system of blockade has given rise to. In the case of the American ships bound to France or Holland, which were brought into the ports of this country under the prohibitory law, the full freight was pronounced to be due where the owners of the cargoes elected to sell here, where they did not elect to sell here, the Court left it to them to settle the freight with the owners of the ships. The Court considered a voyage from America to this country very nearly the same in effect as a voyage to those contiguous countries to which those vessels were originally destined; in all probability the markets of this country were not less favourable than those in the blockaded ports, and no doubt the sale was effected with every attention to the interests of the owners of the cargo. In those cases the Court gave the master the full benefit of the freight, not by virtue of his contract, because, looking at the charterparty in the same point of view as the Courts of common law, it could not say that the delivery at a port in England was a specific performance of its terms. But there being no contract which applied to the existing state of facts, the Court found itself under an obligation to discover what was the relative equity between the parties. This Court sits no more than the Courts of common law do to make contracts between parties; but as a Court exercising an equitable jurisdiction, it considers itself bound to provide as well as it can for that relation of interests which has unexpectedly taken place under a state of facts out of

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the contemplation of the contracting parties in the course of the transaction." The learned judge then again adverts to the circumstances of the case, and concludes, "Under these circumstances I shall direct a moiety of the freight to be paid." It is true that this decision was given in the Admiralty Court exercising a prize jurisdiction; but Lord Tenterden makes no distinction on this head in citing the case as an authority on the subject of the practice of the Admiralty Court, and I think rightly, because the Court only applied to the subjects of prize the general power which, as the history and origin of its jurisdiction shew, it always possessed. Thus Lord Stowell, then at the bar, in his celebrated argument before the Court of King's Bench, which established the jurisdiction of the Prize Admiralty Court over freight claimed by a neutral master against the captor, observed: "It may be admitted that no such power as this is to be found in the Prize Acts, but there are many undoubted privileges of the Court of Admiralty which are not given by them. The Prize Acts are of modern date, and form indeed a very small portion of the law of the Admiralty. They were drawn up principally for the Vice-Admiralty Courts, in which a jurisdiction over questions of prize was thereby for the first time given. But a great part of the Admiralty jurisdiction is founded on the established usage, and, as it were, on the common law of the Admiralty:" *Smart* v. *Wolff*. (1)

1 C.B.D. 63

The modern statute which has given the Admiralty Court jurisdiction in the present case has given it without any restraint as to the exercise of that jurisdiction according to its usual principles and practice.

The general maritime law on the subject now before me is laid down in the well-known French ordonnance. Article xv. of this ordonnance (2) was as follows:—

"S'il arrive interdiction de commerce avec le pays pour lequel le vaisseau est en route, et qu'il soit obligé de revenir avec son chargement, il ne sera dû au maître que le fret de l'aller, quand même le navire auroit été affrété allant et venant."

The Commentary of Valin on this article, is as follows:—

"Le cas où avant le départ du navire, il survient une interdiction de commerce avec le pays pour lequel il est destiné, est prévu par

(1) 3 T. R. at p. 329. (2) Valin Ordonnance de la Marine, l. 3, t. 3, art. xv.

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l'art. 7, tit. premier de ce liv. 3. Ici il agit de la même interdiction de commerce arrivée depuis le départ du vaisseau, et il est décidé que si le navire est obligé par-là de revenir avec son chargement au port d'où il étoit parti, le fret de l'aller sera dû au maître, mais aussi qu'il faudra qu'il s'en contente, quand même le navire auroit été affrété allant et venant. Et rien n'est plus juste, puisque c'est la un cas fortuit, et procédant de force majeur, dont l'affréteur ou marchant chargeur ne peut être garant : c'est bien assez qu'il paie tout le fret de l'aller à causé que le voyage est commencé, par où il se fait une espéce de compensation de la perte causée par cet évenément entre lui et le mâitre du navire."

Emerigon, commenting on the same article, remarks: "Dans ce cas la charte-partie subsiste. Il n'est cependant dû que *le fret d'aller*; c'est par équité que la chose est ainsi décidée entre le maître et les chargeurs." He cites Pothier, Des Chartes-parties, No. 69, tom. 2, p. 394, to the same effect. (1)

Boulay-Paty, in the chapter of his work on Maritime Law, headed "Du Fret, s'il arrive interdiction de commerce avec le pays pour lequel le navire est en route," expresses the same opinion, and cites the 299th article of the modern code de commerce which contains substantially the same regulations as the ordinance. (2) The American Courts have recognized this authority as binding in the absence of any positive law or decision to the contrary. The case in which this authority was followed bore a considerable resemblance to the one now before me. In this case, *Morgan* v. *Insurance Company of North America* (3), Chief Justice Tilghman, said:—

"This is an action on a policy of insurance on freight of the brig *Amazon*, from Philadelphia to Surinam, valued at 3500 dollars.

"The brig sailed from Philadelphia on the 7th of August, 1799, with a cargo consisting of provisions and merchandise, and arrived in the river Surinam on the 17th of September following. During the voyage the colony of Surinam was conquered by the forces of the King of Great Britain. Permission was obtained from the

(1) Traité des Assurances et des Contrats a la Grosse d'Emérigon. P. S. Boulay-Paty, tom. i. cap. xii., sec. xxxi.

(2) Cours de droit Commercial Maritime, tit. viii. s. 10, tom. 2, p. 424, ed. 1834.

(3) 4 Dallas, 455, at p. 457.

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British commander for the brig to go up to the town of Paramanto, and she arrived there with her cargo on the 20th September. On her arrival the captain of the brig, in pursuance of instructions from the owners as well as in pursuance of an agreement between the owners and a certain J. A. Richter, who was a passenger in the said brig, offered to deliver the cargo to the said Richter, upon his paying, or giving security to pay, 25,310 dollars. Richter agreed to pay that sum as soon as possible after the delivery of the cargo, and actually gave good security for the money. But the British collector of the customs refused permission to land any article of the cargo, except the provisions, nor could such permission be obtained, although repeated petitions were presented to the government. The consequence was, that the cargo was not landed, and the captain entered his protest. The brig remained at Paramanto till the 27th of September. The plaintiffs were owners both of the brig and cargo.

"The question is, whether the plaintiffs are entitled to recover, either for a total loss, or for a partial loss, on this policy. The plaintiffs' counsel contend that they are entitled to recover for a total loss; that the landing and delivery of the cargo is an essential part of the contract between the owner and freighter, and not being complied with, no part of the freight has been earned; and that the circumstance of the same persons being owners of the brig and cargo, is immaterial in a question between the assurers and assured. On the other hand, the defendants' counsel say that there has been no loss, because the freight was completely earned.

"No adjudged case, in point, has been cited on either side. The defendants' counsel relied on the case of *Blight* v. *Page* (1), but I do not think that case applicable." The learned judge then deals with that case and continues: "No conclusion can be drawn from this case, under what circumstances freight may be earned or not earned. For it was not an action for the recovery of freight, but of damages for not being permitted to earn freight.

"But although there is no adjudged case, the subject has not escaped the notice of writers on the marine law. In one of the ordinances of Louis XIV (A.D. 1681) (2), it is declared that on a

(1) 3 B. & P. 295, n.

(2) 1 Vol. Ord. Lewis XIV. 656, art. 15, tit. Freight, cited by Abbott (11th ed. p. 378).

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charterparty to carry goods out and in, if during the voyage, the commerce is prohibited and the vessel returns, the outward freight only is earned; and Valin, in his commentary on this article, says, the law is the same, if the vessel is freighted outward only. These ordinances, and the commentaries on them, have been received with great respect in the courts both of England and the United States, not as containing any authority in themselves, but as evidence of the general marine law. Where they are contradicted by judicial decisions in our own country they are not to be respected. But on points which have not been decided they are worthy of great consideration. I am strongly inclined to adopt the rule laid down by Valin, because I think it reasonable." The Chief Justice then proceeded to apply the law as laid down by Valin to the facts of the case.

After as careful a consideration as I have been able to give to the general principles of jurisprudence applicable to the circumstances of this case, in the absence of any direct judicial precedent, I have arrived at the following conclusion: that the owners of the *Teutonia* have not committed any breach of the contract contained in the charterparty and bill of lading either, first, by refusing, in the circumstances, to carry the cargo to the port of Dunkirk; or, secondly, by refusing to deliver up the cargo to the plaintiffs at Dover without any payment of freight whatever either pro ratâ itineris or by way of compensation for the carriage of the goods from Pisagua to Dover. I therefore dismiss this suit with costs.

Solicitors for plaintiff: *Hillyer & Fenwick.*
Solicitors for defendants: *Thomas & Hollams.*

June 6.

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Charterparty—Bill of Lading—Queen's Enemies, restraint of Princes and Rulers—Risk of Capture—Reasonable Delay.

A vessel sailing under the flag of the North German Confederation was, by a charterparty made at Constantinople, in the English language, between her master and a firm of merchants at Constantinople, chartered to take on board a cargo at a port in the Sea of Azov, and to proceed therewith to a safe port in the United Kingdom, or a safe port on the continent between Havre and Hamburg, calling at Cork, or Falmouth, or Plymouth, for orders, and deliver the cargo on being paid the stipulated freight, the act of God, the Queen's enemies, restraint of

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princes and rulers, fire, and all and every the dangers and accidents of the seas, rivers, and navigation of what nature and kind soever excepted.

In pursuance of the terms of the charterparty the vessel proceeded to Berdiansk, and took on board, from a Greek merchant there, a cargo of wheat. For the cargo a bill of lading, in the Italian language, was signed by the master. It was stated in the bill of lading that the cargo was consigned according to the tenor of the charterparty, and that the cargo was to be delivered on freight being paid according to the charterparty, with all other conditions expressed therein. The bill of lading was indorsed by the shipper to S. & Co, who were the charterers' agents in London. The vessel sailed from Berdiansk; on the 8th of August she put into Falmouth, and her master applied to S. & Co. for orders. The master received no orders till the 3rd of September, when the plaintiffs, to whom S. & Co. had indorsed the bill of lading, ordered the vessel by their agent to proceed to Leith.

After the making of the charterparty and the signing of the bill of lading a war broke out between the North German Confederation and France. The war continued until after the arrest of the vessel in the suit. From the time the master received orders to proceed to Leith until after the arrest of the vessel armed French national cruisers were cruising in the English Channel and North Sea, and German vessels could not sail in those seas beyond the limits of neutral waters without incurring risk of capture.

When the master received orders to proceed to Leith, and on other occasions after that time and before the arrest of the vessel, he expressed his willingness to sail for Leith the first favourable opportunity.

From the time the master received orders to proceed to Leith until the arrest of the vessel, the prevailing winds at Falmouth were light and variable, or unfavourable for a passage to Leith, and during that time the master kept the vessel at Falmouth waiting for a leading wind, which would enable her to make a good passage, and afford her a fair chance of escaping the French cruisers.

On the 15th of September, the plaintiffs instituted a suit against the vessel, alleging, as the cause of action, the neglect of the master to proceed to Leith. On the 21st of September the vessel was arrested in the suit at Falmouth:—

Held, that the delay of the master under the circumstances was justifiable.

Before the orders to sail for Leith were given, and afterwards, negotiations were continually going on between the plaintiffs and the master for the delivery of the cargo at Falmouth at a reduced freight, but no terms were agreed upon.

Semble, these negotiations modified the order to proceed to Leith, and afforded a reasonable excuse for the master remaining at Falmouth while the negotiations were being carried on.

THIS was a cause instituted under the 6th section of the Admiralty Court Act, 1861, on behalf of Messrs. A. Southgate and Son, merchants, of Ipswich, in the county of Suffolk, against the vessel *Heinrich*, and freight, and against the defendants the owners of the *Heinrich* intervening.

The petition was in substance as follows:—

1. The *Heinrich* is a vessel of which no owner or part owner was at the time of the institution of this cause domiciled in England or Wales.

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2. On the 11th of March, 1870, a certain charterparty was made and entered into between the defendants and Messrs. Brockelmann & Hartog, of Constantinople, whereby it was amongst other things agreed that the said ship should proceed to a safe port in the Sea of Azov, and there load a certain cargo, and being so loaded, should therewith proceed to a safe port in the United Kingdom of Great Britain and Ireland, or a safe port on the Continent between Havre and Hamburg, both inclusive, or so near thereto as she might safely get, calling at certain ports at the master's option for orders which were to be given by return of post, in reply to the captain's letter to the charterers' agents in London.

3. Pursuant to the terms of the said charterparty, the *Heinrich* proceeded to Berdiansk, where one Michele Païcos, with the consent of the said charterers, caused to be shipped on board of her a certain cargo of grain, and the master of the said vessel received and accepted the said cargo, to be carried on board the said vessel to any safe port in the United Kingdom of Great Britain and Ireland or Continent between Havre and Hamburg, calling at Queenstown, Falmouth, or Plymouth for orders as per charterparty, and to be delivered, certain dangers only excepted, unto the order of the said Michele Païcos, on the terms of and under a certain bill of lading, dated the 27th of May, 1870, duly signed, executed, and delivered by the said master.

4. The said bill of lading was afterwards assigned and endorsed by the said Michele Païcos to Messrs. Spartali & Co., of London, merchants, and was by them endorsed to Messrs. Moffatt & Brown, of Liverpool, who afterwards indorsed the same to the plaintiffs, who became, were, and are the assignees of the said bill of lading, within the true intent and meaning of the 6th section of the Admiralty Court Act, 1861.

5. The *Heinrich* sailed from Berdiansk, with the said cargo on board, and arrived in the prosecution of her aforesaid voyage at the port of Falmouth for orders, with the said cargo on board, where her said master was duly ordered in accordance with the terms of the said charterparty and bill of lading to proceed to Leith, and here to discharge and deliver the said cargo, and all conditions were fulfilled necessary to entitle the plaintiffs to have the said cargo carried on the said vessel, and delivered at Leith to the plaintiffs according to the terms of the said bill of lading.

6. The master of the *Heinrich*, however, in violation of the terms of the said bill of lading, refused to proceed with the said vessel and cargo to Leith, and remained with the same at Falmouth.

The answer of the solicitors for the owners of the *Heinrich* was, in substance, as follows:—

1. At the time of the making of the charterparty in the petition mentioned, and thenceforward until and at the time of the institution of this suit, the *Heinrich* was a vessel sailing under the North German flag and belonging to the port of Rostock, in the Grand Duchy of Mecklenburg, then and still being one of the states of the North German Confederation, and the defendants were then and still are domiciled at Rostock, and subjects of the said Grand Duchy and of the said Confederation.

2. On the 11th day of March, 1870, when the said charterparty was entered into, the *Heinrich* was at Constantinople, in Turkey, and the said charterparty

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was then and there entered into between the master of the *Heinrich* and Messieurs Brockelmann and Hartog, carrying on business in that city, but being subjects of the North German Confederation.

[The charterparty was here set out. It was in the English language, and in substance as follows:—]

"Constantinople, 11th March, 1870.

"It is this day mutually agreed between Captain Krull of the good ship or vessel called the *Heinrich*, of German flag, of the burthen of 1700 quarters register measurement, or thereabouts, whereof he is master, now in this port ready, and Messieurs Brockelmann and Hartog of this city, merchants. That the said ship shall with all convenient speed proceed to a safe port in the Sea of Azov, as ordered at Berdiansk, in twenty-four hours after arrival, or lay days to count, and there load from the factors of the said freighter a full and complete cargo of tallow, wheat, Indian corn, seed, or other stowage goods or grain at the option of the freighter; and being so loaded, shall therewith proceed to a safe port in the United Kingdom, or a safe port on the Continent, between Havre and Hamburg (both inclusive), or so near thereunto as she may safely get, calling at Cork or Falmouth or Plymouth at the master's option for orders (which are to be given by return of post in reply to the captain's letter to the charterers' agents in London, or lay days to commence), and deliver the same always afloat at all times on being paid freight as follows. [The charterparty specified the freight to be paid]. (The act of God, the Queen's enemies, restraint of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of what nature and kind soever, during the said voyage, always mutually excepted). The freight to be paid in cash on unloading and right delivery of the cargo. Thirty-five running days are to be allowed the said merchant (if the ship be not sooner despatched) for loading and unloading, and if one half or more of the cargo consist of wool, ten additional lay days to be allowed, ten days on demurrage over and above the said laying days, at five pounds per day. Detention by frost and quarantine not to be reckoned as lay days.

3. The *Heinrich* thereupon proceeded to Berdiansk, which is a port in the empire of Russia, and pursuant to the said charterparty received on board a cargo of wheat (being the cargo in the petition mentioned) from Michele Païcos, in the said petition named, who was a subject of the kingdom of Greece. The said master of the *Heinrich* signed and delivered a bill of lading in three parts for the said cargo, being the bill of lading mentioned in the said petition. Such bill of lading was and is in the Italian language, and the following is a correct translation thereof, that is to say:—

"Berdianski, 27th May, 1870.

"In the name of God, has been loaded at this port by Mr. Michele Païcos, on account and risk of whom it may concern, on board the Mecklenburg brig, called *Heinrich*, Captain J. H. Krull, to conduct and to consign the same on this his present voyage according to the tenor of his charterparty stipulated at Constantinople, and dated 11th May, 1870. To order the goods as stated and numerated at foot in the same and like good condition and as such the said captain promises on his safe arrival to deliver, the freight being paid him according to the terms of his charterparty, with all other conditions expressed therein. In witness whereof the master will sign this with

[Endorsement in margin.] Consumed for loading the cargo 24 lay days.

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similar others put before him, one of which being accomplished, the others to stand void.

"W. J. M. Païcos."

4. The *Heinrich* sailed in due course from Berdiansk with the cargo so shipped on board her, and on the 8th day of August, 1870, arrived therewith at Falmouth, and on the 9th day of August, 1870, the Master of the *Heinrich* wrote to Messrs. Spartali & Company, of London, who were at that time the charterers' agents in London, within the true intent and meaning of the said charterparty, a letter in the words and figures following, that is to say:—

"Falmouth, 9th August, 1870.

"Messrs. Spartali & Co., London.

"Gentlemen,—I herewith beg to advise you of my safe arrival here with the North German brig *Heinrich* under my command, with a cargo of wheat from Berdianski, awaiting your orders as soon as convenient.

"I remain, Gentlemen, yours, &c.,

"J. K. Krull."

5. The said master of the *Heinrich* did not receive any answer to the said letter, nor did he receive any orders in writing or otherwise from the charterers' agent in London, or from any person having authority to give such orders, until the 3rd day of September, 1870, upon which day he received orders to proceed with the said cargo to Leith, to there discharge the same.

6. On the 15th day of November, 1870, this suit was instituted, and on the 21st day of the same month the *Heinrich* was arrested in this suit.

7. After the making of the said charterparty, and the signing and delivery of the said bill of lading, and before the arrival of the *Heinrich* at Falmouth, a war broke out and was existing between France and the states of the said North German Confederation, including the said Grand Duchy of Mecklenburg, and such war continued to exist from the time of the said arrival of the *Heinrich* at Falmouth until and at the time of the said arrest.

8. From the time of the said arrival of the *Heinrich* at Falmouth, and until the time of the institution of this suit, and until the time of the said arrest, armed French national cruisers were lying off the port of Falmouth, and elsewhere in the neighbourhood, with the design and intention of capturing the *Heinrich* and other North German ships, and other armed French national cruisers were in the English Channel and North Sea, and in the Frith of Forth, with the like design and intention; and had the *Heinrich* during such time attempted to proceed from Falmouth to Leith she would almost certainly have been captured by, and there would not have been any reasonable expectation that she would have escaped capture by, some or one of such cruisers.

9. At the time of the institution of this suit, and at the time when the *Heinrich* was arrested as aforesaid, negotiations were pending between the *Heinrich* and the plaintiffs for the discharge and delivery of the said cargo elsewhere than at the port of Leith.

10. It is not the fact that the master of the *Heinrich* refused to proceed with the said cargo to Leith. The said master was always ready and willing to proceed with the *Heinrich* to the said port within a reasonable time after receiving orders, but a reasonable time had not elapsed at the time of the institution of this suit, or at the time when the *Heinrich* was arrested as aforesaid.

11. Until and at the time of the said arrest, the master of the *Heinrich* had been prevented from leaving Falmouth with the *Heinrich* by the enemies of the said North German Confederation and of the Duke of Mecklenburg, being the Queen's enemies within the true intent and meaning of the said charterparty and bill of lading.

12. By the law of the said states of the said North German Confederation and of the said Grand Duchy, regard being had to the terms of the said charterparty and bill of lading, the master of the *Heinrich* was not bound to attempt to proceed from the said port of Falmouth to Leith with the *Heinrich*, if by so doing he would have exposed the *Heinrich* to risk of capture; and the said master would, by attempting to proceed with the *Heinrich* to Leith at any time after he received orders so to proceed up to the time of the institution of this suit and of the said arrest, have exposed the *Heinrich* to risk of capture, and by reason of the premises the master of the *Heinrich* and the defendants had not at the time of the institution of this suit been guilty of any breach of contract or duty with or to the plaintiffs.

13. Save as herein appears, the defendants deny the truth of the allegations contained in articles 2, 3, 4, 5, and 6 of the said petition.

The plaintiffs' solicitors, in the reply, denied all the several averments in the answer, save such averments as were stated or admitted in the petition, and alleged that the master of the *Heinrich* had committed, according to the law of the states of the North German Confederation, a breach of contract and duty in remaining with his ship at Falmouth, and refusing to proceed to Leith.

On the 8th, 9th, and 10th of May the case was heard. Evidence was given to prove the allegations in the 4th article of the petition and in the 1st article of the answer. The 6th and 7th articles of the answer were admitted, and it was agreed that the evidence given in the case of *The Patria* (1), with reference to the risk of capture by French cruisers, should be admitted as evidence in this cause. The only material facts about which there was any conflict of evidence were the facts alleged in the 5th and 6th articles of the petition, and the 9th and 10th articles of the answer. The substance of the evidence with reference to these facts was as follows:—The letter set out in the 4th paragraph of the answer was written and sent by the master of the *Heinrich* to Spartali & Co. on the 9th of August, 1870. Spartali & Co. were the persons with whom he was directed by the shippers of the goods to communicate. The master received no answer to this letter, and on the 22nd of August he noted a protest against detention. On the

(1) Post, p. 436.

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23rd or on the 25th of August, and again on the 27th or 28th of August (the witnesses did not agree as to the exact dates), Mr. Coward, a clerk in the office of Messrs. Fox & Co., of Falmouth, the agents of the plaintiffs' broker, saw the master. Coward and the master each gave a somewhat different version of the conversations which took place at these interviews. The result of the evidence with reference to these conversations appears from the judgment. On the 3rd of September Mr. Tilly, who acted as the attorney for Fox & Co., delivered to the master a letter which was in the following terms:—

"Falmouth, 3rd Sept., 1870.

"Sir,—I am instructed by the owner of the cargo of wheat laden on board your vessel, the brig *Heinrich*, to order you at once to proceed with your said vessel to Leith to discharge your said cargo at that port.

"Yours obediently,

"Harry Tilly,

"Attorney-at-Law.

"Captain Krull,

"Brig *Heinrich*, Falmouth."

The master told Tilly he would sail for Leith on the first favourable opportunity. On the 5th or 6th of September the master instructed Mr. Van Weenen, the agent of the German Lloyd's at Falmouth, to clear the vessel for Leith, and Van Weenen obtained from the Custom House authorities permission for the vessel to sail. On the 5th of September Coward had another interview with the master. Coward then, as he had done before, asked the master to allow 2*s.* or 3*s.* per quarter reduction in the freight, and to deliver at Falmouth. The master claimed demurrage, and said he would agree to a reduction in freight of 6*d.* per quarter, but not more, for delivery at Falmouth; and if that was not accepted, he would sail for Leith. On the 10th of September, and again on the 14th, further negotiations were carried on between Coward and the master, but no arrangement was effected. On the 12th of September the master began to prepare the brig for sea, when the crew said they would not go. They said they were afraid of being captured by the French, and being put in prison in France. The master then saw the German consul at Falmouth, and told the

crew the consul said they were bound to go. The master promised the crew that they should be paid their wages if they were captured, and the next day (the 13th) the crew said they were willing to sail. On the 14th the weather was changeable and the wind uncertain, and from that day until the 21st the wind was either very light, or from a quarter unfavourable for getting well away. The master, in his evidence, said he was waiting for a westerly breeze which would enable him to make the passage to Leith quickly, inshore, and out of the way of the French cruisers; that from the time of his receiving orders to sail to Leith he was waiting only for a leading wind, and was all the time ready to sail had the wind been favourable, and frequently expressed to the plaintiffs' agents his willingness to sail for Leith the first favourable opportunity.

Mr. Travers, the vice-consul in London of the North German Confederation, who had passed through the course of study necessary to qualify him to act as an advocate or a judge in Germany, gave evidence to prove the provisions of the North German code. He referred to Mr. Wendt's English translation of the following articles of the code: Articles 631, 636, 637, 505. (1) He further stated that, according to German law, it was competent to the parties to a contract of affreightment, by express stipulation, to modify or exclude the operation of the provisions of the code, except in particular instances, where by the code it was expressly provided that particular stipulations should not be entered into. There was nothing to prevent the parties to a contract of affreightment making what stipulations they pleased with reference to the detention of the ship on the voyage.

The suit was instituted on the 15th of September, and the brig was arrested at Falmouth on the 21st of September.

Butt, Q.C., and *Cohen*, for the plaintiffs. The provisions of the German code do not apply. The parties, by the express terms of the contract, have stipulated that certain events only shall excuse the completion of the voyage. Even according to the principles of German law this stipulation of the parties excludes the provi-

(1) The material provisions of these articles are set out in the report of *The Patria*, post, p. 448.

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sions of the German code. The whole question turns upon the construction of the contract.

The master received orders to sail on the 3rd of September, and until the vessel was arrested, on the 21st of September, he neglected to act upon those orders. This delay cannot be justified, unless it can be shewn that it was caused by the perils expressly excepted by the terms of the contract. The phrase "the act of God and the Queen's enemies, restraint of princes and rulers, and every other the dangers and accidents of the seas, rivers, and navigation," applies to some actual operative restraint. A mere remote possibility of capture is not a peril within the exception, and it is not pretended that the state of the weather was such as to render it impracticable to proceed. It is clear that, on the 12th of September, the brig might and would have sailed if the crew had not refused, and the owners are liable for the acts of the crew. On that day there was a clear breach. Assuming that the provisions of the German code applied, and that the existence of the war gave either party a right to withdraw from the contract, the master was bound to exercise the option of withdrawing from the contract without delay, and to adopt measures to prevent the deterioration of the cargo. But the master would neither withdraw from the contract nor perform it; therefore in any view of the case he was guilty of a breach of contract or breach of duty.

Milward, Q.C., and *E. C. Clarkson*, for the defendants. The provisions of the German code justify the acts of the master, and it is not to be presumed that it was the intention of the parties at the time they entered into the contract to exclude the operation of the code. But independently of the provisions of the code, the conduct of the master is justifiable: the acts of the enemies of the sovereign of the owners of the *Heinrich* fall within the exception in the charterparty: *Russell* v. *Niemann* (1); and whether the peril occasioned by the French cruisers was or was not such as to justify an abandonment of the contract, it was such as to justify the delay complained of: *Pole* v. *Cetcovich*. (2) It cannot be said that a ship is bound to sail the instant she receives orders, without any regard to the dangers to be encountered at that particular moment, when

(1) 17 C. B. (N.S.) 163; 34 L. J. (C.P.) 10.
(2) 9 C. B. (N.S.) 430; 30 L. J. (C.P.) 102.

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by a little delay there is a reasonable prospect that the dangers will be lessened or avoided. If the brig had sailed when the wind was light or adverse, she might have been knocking about at sea for days, during which time she would have been exposed to great risk of capture; it was therefore reasonable in the master to wait for a westerly breeze, which would have carried him rapidly along the shore, almost within British waters, and out of the reach of the French cruisers. Moreover, the negotiations which were going on almost up to the last moment before the institution of the suit for the delivery of the cargo at Falmouth, would alone justify the delay which took place. The circumstance that the plaintiffs neglected to give any orders until after the master had noted a protest against detention, coupled with the other circumstances of the case, shew that the plaintiffs never intended the vessel to sail to Leith, they gave the orders to sail to Leith merely in order to induce the master to abandon his claim for demurrage, and to consent to a reduction of freight on delivery at Falmouth.

Butt, in reply. The delay between the 3rd of September and the 23rd was altogether unreasonable in any view of the case; the circumstances did not justify a delay of more than one or two days. The discussion about reduced freight on delivery at Falmouth never assumed the form of any definite arrangement, and could not operate in any way to dispense with compliance with the orders given.

Cur. adv. vult.

June 6. SIR ROBERT PHILLIMORE. This is a suit brought by Messrs. A. Southgate & Son, the assignees of the bill of lading of a cargo lately laden on board the vessel *Heinrich*, against the said vessel, under the 6th section of the Admiralty Court Act, 1861. The *Heinrich* is a vessel sailing under the flag of the Grand Duchy of Mecklenburg, one of the states of the North German Confederation.

On the 11th of March, 1870, the *Heinrich* being then at Constantinople, a charterparty was entered into between her master and Messrs. Brockelmann & Hartog, of Constantinople.

The ship was to take on board a cargo at Berdiansk, in the Sea of Azov, and to proceed to a safe port in the United Kingdom, or a safe port on the continent between Havre and Hamburg. [The learned Judge here read the provisions of the charterparty.] The

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ship proceeded to Berdiansk, and took on board the cargo of wheat mentioned in the petition from a Greek merchant, Michele Païcos. A bill of lading was signed by the master at Berdiansk, in three parts, in the Italian language, of which the following translation is in all material parts accurate. [Here the learned Judge read the translation of the bill of lading.]

The ship arrived at Falmouth on the 8th of August, and on the 9th the master wrote to Spartali & Co., from whom Païcos had told him to get his orders, and who were the charterers' agents in London, and also indorsees of the bill of lading, as follows. [Here the learned Judge read the letter of the 9th of August, 1870, set out above.]

No answer was received by the master to this letter. On the 23rd or 25th of August, some conversation passed between him and Mr. Coward—Coward was a clerk in the office of Fox & Co., who acted as agents for Luxton, the broker of the plaintiffs, Messrs. A. Southgate & Son. According to Coward, the master was asked whether he would allow his ship to be towed to Dublin, when he said he would allow her to be towed to Plymouth, if the consignees paid the towage. According to the master, nothing was said about towing by steam; he was asked to sail to Dublin, and said it would be dangerous to do so. Nothing was said about being towed to Plymouth, to which place he never refused to go, but would on the contrary have been happy to have gone. It does not appear from the evidence that any definite order for a port of destination was given at this interview. On the 27th or 28th Coward asked him if he would like to go to Leith; he said, "You have no business to ask such a question. I put into this port for orders." He was then asked if he would make a reduction on his freight instead of going to Leith, and he offered to take a pro ratâ freight, and it was settled that Coward should write to his principal on the subject.

Upon the 3rd of September, for the first time, the master received something approaching to a distinct order to go to Leith. He ought to have received, according to the charterparty, an answer by return of post to his letter of the 9th of August; and demurrage would begin from that date. On the 15th of September the suit was instituted in this Court, and on the 21st the ship was arrested; the true question is, whether the not sailing between

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the 3rd and 21st of September constituted a breach of contract. On the 3rd of September the master said—as he said continually on the other days of this interval—that he would sail for Leith on the first favourable opportunity; meaning, he said, favourable in two senses, namely, first, having a fair wind for leaving the port; and, secondly, such a wind as would enable him to run if he saw French cruisers.

That there were French cruisers in the neighbourhood, and there was a real risk of capture, are conclusions which must be drawn from the evidence. Mr. Van Weenen says that he received orders from the master to clear the vessel for Leith on the 5th or 6th of September, and that he did not clear the vessel because he feared the French consul would learn her destination, and that he obtained permission from the Custom House to pay the light dues after the vessel had gone out. On the 12th of September the crew refused, when ordered to weigh anchor, alleging an apprehension which I believe was sincere, of being captured and imprisoned by the French.

At the same time negotiations were continually going on, having for their object the delivery of the cargo at Falmouth for a reduced freight. Looking to all the circumstances of the case, I am of opinion that whether the English or whether the German law be applied to the construction of the contract of affreightment, which in this case is to be derived from the charterparty and the bill of lading, the delay of the master was justified by the existence of the excepted peril of the enemies of his sovereign: *Russell* v. *Niemann*. (1) I also think that the continuing treaty on the subject of the reduction of freight, modified the character of the order to sail for Leith which he received, and which I cannot help surmising was given for the purpose of inducing the master to acquiesce in the larger reduction of freight proposed on behalf of the plaintiffs; and I doubt, to say the least, whether any positive refusal of a distinct and clear order is established in this case. But I think the first ground sufficient to support the defence which is set up in the answer; and I dismiss the petition with costs.

Solicitors for plaintiffs: *Thomas & Hollams.*

Solicitors for defendants: *Gregory, Rowcliffes, & Co.*

(1) 17 C. B. (N.S.) 163; 34 L. J. (C.P.) 10.

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Admiralty Court Act, 1861 (24 *Vict. c.* 10), *s.* 6—*Breach of Duty or Breach of Contract on the part of the Owner or Master of a Ship—Jurisdiction—Authority of Master to sign Bills of Lading—Outbreak of War—Right of Consignee to Delivery of Cargo at a Port short of the Port of Destination—Pro ratâ Freight—Conflict of Laws—General Maritime Law.*

A schooner sailing under the flag of the North German Confederation, and owned by subjects of one of the states of the Confederation, was chartered by a German firm for a voyage from the west coast of Central America to a port on the Continent, between Havre and Hamburg, and Bordeaux inclusive, or a port of Great Britain. The charterparty was in the German language, and provided that the master should not be responsible for dangers of the sea for events caused by high powers or any other event of navigation. The schooner was loaded at ports on the west coast of Central America with a general cargo of goods shipped to be delivered at Hamburg to several consignees. Part of the cargo consisted of a parcel of coffee shipped by a foreign firm. This coffee was stowed near the bottom of the hold, and goods consigned to other consignees were stowed above it. For this coffee the master signed bills of lading in the English language, the bills of lading contained no reference to the charterparty, and provided that the coffee should be delivered at Hamburg (the dangers of the seas only excepted) unto the plaintiffs or to assigns. The plaintiffs were merchants, carrying on business in London, and at the time of the shipment neither they nor the shippers had notice of the charterparty. On the 5th of April, 1870, the schooner sailed on her voyage to Hamburg; during the voyage, her master and one of her crew became dangerously ill, and in order to obtain medical assistance, her course was shaped for Falmouth. When near Falmouth, she heard, as the fact was, that a war which had broken out after the date of the sailing of the vessel on her homeward voyage, was being waged between the states of the North German Confederation and France. She put into Falmouth on the 23rd of August, and after having obtained such assistance as she needed, she continued to remain there until after the institution of the suit on the 7th of November. Before the schooner arrived off Falmouth, the French fleet had instituted a blockade of the port of Hamburg, which was maintained until September. The raising of the blockade was notified on the 18th of September. The war continued until after the date of the institution of the suit, and until after that date armed French national cruisers were cruising in the English Channel and North Sea, and German vessels could not sail in those seas beyond the limits of neutral waters without incurring risk of capture. The plaintiffs heard of the arrival of the schooner at Falmouth soon after she put in there, and they acquiesced in her remaining there during the blockade of Hamburg, but they did not acquiesce in her remaining there after the raising of the blockade. During the blockade, the plaintiffs offered to take delivery of the coffee at Falmouth and to pay full freight there, and after the raising of the blockade they offered to take delivery of the coffee on the same terms at Falmouth or at Hamburg. Those in charge of the schooner refused to deliver the coffee at Falmouth.

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In a suit in rem, instituted by the plaintiffs against the schooner for breach of duty or breach of contract, on the part of her owners or master :—

Held, following *The Bahia* (Br. & L. 62), that the Court had jurisdiction to entertain the suit. That the contract contained in the bill of lading was not affected by the terms of the charterparty, and that the schooner was liable for any breach of the terms of the bill of lading. That according to the terms of the bill of lading the breaking out of the war did not relieve the schooner from her obligation to fulfil the contract; that within a reasonable time after the notification of the raising of the blockade of Hamburg the schooner was bound to proceed on her voyage there, and her neglect to proceed on her voyage there from the 18th of September until the date of the institution of the suit constituted a breach of contract. That whether the rights of the parties with reference to the delivery of the coffee at Falmouth depended upon the provisions of the English law, the German law, or the general maritime law, the refusal of those in charge of the schooner to deliver the goods to the plaintiffs at Falmouth, after the offer to pay full freight, was not justifiable.

Lloyd v. *Guibert* (Law Rep. 1 Q.B. 115) considered. Observations upon the general maritime law.

THIS was a cause instituted under the 6th section of the Admiralty Court Act, 1861, on behalf of Messrs. Chalmers, Guthrie & Co., of Idol Lane, in the city of London, merchants, the consignees under bill of lading of 1923 bags of coffee now or lately laden on board the vessel *Patria*, against the *Patria* and the freight due for the transportation of the said 1923 bags of coffee now or lately laden therein and against the defendants the owners of the said vessel intervening. The petition was in substance as follows :—

1. The *Patria* is a vessel of which no owner or part owner was, at the time of the institution of this cause, domiciled in England or Wales.

2. In the month of March, 1870, whilst the above-named vessel *Patria* was lying in the port of Champerico, Messrs. Fdigoras y Ceballas, of Champerico, caused to be shipped on board the said vessel certain goods, consisting of 1923 bags of coffee, and the master of the said vessel received and accepted the same to be carried on board the said vessel from Champerico to Hamburg, viâ Tecojate and San José de Guatemala, and to be there delivered, dangers of the seas only excepted, unto the plaintiffs or their assigns, upon the terms of a certain bill of lading duly signed, executed and delivered by the master.

3. The said bill of lading was afterwards delivered by the said Messrs. Fdigoras y Ceballas to the plaintiffs, who became, were, and are the consignees of the said goods within the true intent and meaning of the 6th section of the Admiralty Court Act, 1861.

4. All conditions were fulfilled, and all things were done and happened, and all times elapsed necessary to entitle, and nothing has happened to disentitle the plaintiffs to have the terms of the said bill of lading observed by the defendants, and to have the said cargo carried in the said vessel to and delivered at Hamburg to the plaintiffs, according to the terms of the said bill of lading.

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5. The *Patria* sailed from Champerico with the said goods on board, but her master, in violation of the terms of the said bill of lading, neglected and refused to proceed to Hamburg, and without any justifiable cause proceeded with the said vessel and goods to Falmouth, and there remained.

6. Subsequently to the arrival of the said vessel at Falmouth the plaintiffs demanded possession of the said goods of the said master, tendering freight in respect of the same, but the said master and the said defendants nevertheless refused to give and have not given possession of the said goods to the plaintiffs.

7. By reason of the premises the plaintiffs have incurred great loss on account of their being deprived of the said goods, and have also been put to great expense in and about endeavouring to get possession of the same, and the plaintiffs have been otherwise greatly damnified and injured.

The answer on behalf of the owners of the *Patria* was in substance as follows:—

1. At the time of the shipment on the *Patria*, of the goods mentioned in the petition, and thenceforward until and at the time of the institution of this suit, the *Patria* was a vessel sailing under the flag of the North German Confederation, and belonging to the port of Geestemunde, in Hanover, which is one of the states, or a portion of one of the states, of the said Confederation, and the owners of the *Patria*, during all the time aforesaid, were and still are, subjects of the said Confederation or of one of the states thereof.

2. In the month of March, 1870, the *Patria*, which was then under charter to Messrs. Frederick Muller & Sons, of Bremen, subjects of the said Confederation, was lying in the port of Champerico, in the Republic of Guatemala, taking in a cargo for Hamburg, pursuant to the charterparty with the said Messrs. Muller & Sons, and the said Messrs. Muller & Sons, under such charterparty, caused to be shipped by Fdigoras y Ceballas on board the *Patria* the goods mentioned in the petition, to be carried to Hamburg, viâ Tecojate and San José de Guatemala, on the terms of a bill of lading signed and delivered by the master of the *Patria*, which bill of lading was and is in the words and figures following, that is to say:—

"Shipped in good order and condition by Fdigoras y Ceballas on board the vessel called the *Patria*, whereof B. H. Kassebohm is master, now lying at the port of Champerico, and bound for Hamburg, viâ Tecojate and San José de Guatemala. To say, 1923 bags of coffee of 130 lbs. net, each being marked and numbered as in the margin, and are to be delivered in the like order and condition at the port of Hamburg (the dangers of the seas only excepted), unto Messrs. Chalmers, Guthrie & Co., of London, or to assigns, he or they paying freight for the said goods, four pounds British sterling per ton of 2240 lbs., and five per cent. primage. In witness whereof the master or purser of the said

Compania de Agmoras de
San Jose Guatemala Y & C,
916 bags of coffee.
M V, 543 „
J G, 464 „
1,923 bags of coffee of 130
lbs. net each.

Inhalt und Gewicht
unbekannt. (1)
Frei von Beschädigung. (2)

(1) "Contents and weight unknown." See German General Mercantile Code, 5th Book, articles 656–658. [Wendt's Maritime Legislation, p. 204.]

(2) "Free from damage." The German Code (supra), provides by article 659 as follows: If the bill of lading contains the clause "free from

vessel hath affirmed to five bills of lading, all of this tenor and date, one of which being accomplished the others to stand void.

"Dated in Champerico, the 19th day of March, 1870.

"B. H. Kassebohm."

3. Five copies of the said bill of lading were signed by the said master, and four of such copies were delivered by him to the said Fdigoras y Ceballas.

4. Other goods were also caused by the said charterers to be shipped on board the *Patria*, at Champerico, to be carried to Hamburg, by persons other than the said Fdigoras y Ceballas, and being subjects of the said Confederation, who were carrying on business at Guatemala, and the said goods so shipped by them were shipped on account of the said shippers thereof or of other persons, being subjects of the said Confederation, and were at the time of the arrival of the *Patria* in the English Channel, as hereinafter stated, and thenceforward until and at the time of the institution of this suit the property of the said shippers or of other subjects of the said Confederation.

5. The *Patria* proceeded from Champerico to San José de Guatemala to complete her cargo, and while she was lying there as a general ship for Hamburg, divers other persons and firms, being resident in Guatemala, but subjects of the said Confederation, caused to be shipped in the *Patria* divers other parcels of goods to be carried to Hamburg. Such parcels of goods, or some of them, were shipped on account of the respective shippers thereof, or of other persons, subjects of the said Confederation, and were at the time of the said arrival of the *Patria* in the English Channel, and thenceforward down to and at the time of the arrival of the *Patria* in the English Channel, and until the institution of this suit, the property of subjects of the said Confederation.

6. On the 5th day of April, 1870, the *Patria*, with all the said goods on board, sailed from San José de Guatemala on her said voyage to Hamburg, and on the 23rd day of August following arrived in the English Channel, with certain of her crew seriously ill and in want of immediate medical assistance.

7. Subsequently to the said ship so leaving San José de Guatemala, and before the said arrival of the *Patria* in the English Channel, war broke out, and was declared between the empire of France and the states of the said Confederation, and such war continued to exist and was existing at the time of the arrival of the *Patria* in the English Channel, and by reason of such war the *Patria* and the said goods forming her cargo, or some of them, became and were liable to risk of capture.

8. Subsequently to the said sailing of the *Patria* from the port of San José de Guatemala, the port of Hamburg, which was and is one of the ports of the said Confederation, was declared to be, and in fact was, effectually blockaded by armed cruisers, being portion of the French fleet, and such blockade continued in force until and at the time of the arrival of the *Patria* in the English Channel.

9. Upon the said arrival of the *Patria* in the English Channel information was given to her master of the said war and of the said blockade, and the master of the *Patria*, as he lawfully might do and ought to have done, under and by virtue of the law of Hanover and of the states of the said North German Con-

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damage," the shipowner is not answerable for damage till proof of fault on the part of the master or other person for whom the shipowner is responsible.

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federation, and as was reasonable and proper for him to do under the circumstances hereinbefore set forth, put into the harbour of Falmouth with the *Patria*, where he arrived on the 23rd day of August, 1870. It is not the fact that the said master proceeded to Falmouth in violation of the terms of the said bill of lading and without justifiable cause, as alleged in the fifth article of the said petition.

10. On the 7th day of November, 1870, this suit was instituted by the plaintiffs, and on the 9th day of the same month the *Patria* was arrested therein.

11. From the time of the said arrival of the *Patria* in Falmouth as aforesaid until the time of the institution of this suit and the said arrest of the *Patria*, the said war existed between the states of the said Confederation and the empire and government of France, and during all such time the *Patria* and her cargo, or part thereof, would, had she left Falmouth and attempted to proceed to Hamburg, have been liable to risk of capture, and during all such time French national cruisers were off the port of Falmouth and elsewhere in the English Channel, and in the North Sea, and off the mouth of the river Elbe, with the intention of capturing North German ships, and if the *Patria* had left Falmouth and attempted to proceed to Hamburg during the time aforesaid, she and her cargo would almost certainly have been captured by some or one of the said cruisers, and there was no reasonable expectation during the time aforesaid that she and her cargo would have escaped such capture.

12. The said port of Hamburg continued to be blockaded until on or about the 22nd day of September, 1870.

13. By the law of Hanover and of the said North German Confederation the master of the *Patria* was entitled to keep the *Patria* in Falmouth harbour whilst the *Patria* or her cargo, or part thereof, would have been liable to risk of capture at sea by reason of the continuance of the said war, and the master of the *Patria* was not by such law, whilst the blockade continued, or whilst the said war and liability to risk of capture continued, under any obligation to the plaintiffs to proceed or to attempt to proceed to Hamburg with the *Patria*, and by the said law the master of the *Patria* in putting into and remaining with the *Patria* in the said harbour of Falmouth with the said goods as aforesaid, had not at the time of the institution of this suit been guilty of any breach of duty or of contract to or with the plaintiffs.

14. It is not the fact that the master of the *Patria* ever refused to proceed with the *Patria* to Hamburg. On the contrary, the master of the *Patria* was always ready to proceed with the *Patria* to Hamburg whenever the *Patria* and her cargo would not, whilst so proceeding, have been liable to risk of capture as aforesaid.

15. By the law of Hanover, and of the said Confederation, certain expenses, incurred by reason of the *Patria* having gone into and having been detained at Falmouth, became divisible among ship freight and cargo, according to the principles of general average, and by such law the master of the *Patria* was entitled to retain any part of the cargo of the *Patria* for the proportion of such expenses chargeable on or in respect of such part, or until the owner of such part should have given security for the payment of such proportion, and the plaintiffs never tendered or offered to pay their proportion of the said expenses in respect of the cargo comprised in the said bill of lading nor to give security for the same.

16. The plaintiffs did not, on demanding possession of the goods mentioned in

the said bill of lading, or at any time before the institution of this suit, produce to the master of the said ship any bill of lading for the said goods.

17. By the law of Hanover and of the said Confederation, the master of the *Patria* was forbidden to deliver to the plaintiffs, and could not lawfully deliver to the plaintiffs, the goods mentioned in the said bill of lading, unless all the copies of the said bill of lading, signed by the said master and delivered by him as aforesaid, were delivered and returned to him. The plaintiffs never tendered to the said master divers of the said copies of the said bills of lading, and divers of such copies have remained and are in the hands of persons unknown to the said master and the owners of the *Patria*.

18. The said goods mentioned in the said bill of lading were stowed at the bottom of the hold of the *Patria*, and under the goods, or a great portion of the goods, forming the rest of the cargo of the *Patria*, and it was not possible for the master of the *Patria* to give possession to the plaintiffs of the goods mentioned in the said bill of lading without moving and unlading the rest of the cargo, which the said master had not any authority to do, and would not have been justified in doing, and could only have done in breach of his duty to the owners of the rest of the said cargo.

19. The defendants deny the truth of the allegations contained in the third article of the said petition, and, save as herein appears, they deny the truth of the several other allegations contained in the said petition.

20. The defendants further say that, by the charterparty aforesaid, which bore date the 29th day of January, 1869, the said charterers were entitled to the use of the said ship, and that the said ship had been put up by them as a general ship, and thereby the said bill of lading was signed and delivered by the said master pursuant to the terms of the said charterparty, for the benefit of the said charterers, and not for the benefit of the owners of the said ship; and that, in signing and delivering the said bill of lading, the said master acted as agent for the said charterers and not as agent for the defendants.

21. The said Fdigoras y Ceballas had, at the time when the said goods were shipped, notice that the said ship was under charter, and the plaintiffs had, at the time when they became the consignees of the said goods, if ever they did become such consignees, notice that the said ship was under charter at the time of the said shipment.

22. The defendants submit that the said goods mentioned in the said bill of lading were not carried into any port in England or Wales within the true intent and meaning of the Admiralty Court Act, 1861, s. 6, and that this Honourable Court has not jurisdiction to entertain this suit.

The plaintiffs' reply was as follows:—

1. All the several averments in the said answer contained are untrue save such as are stated or admitted in the plaintiffs' petition.

2. It is submitted that all the several averments contained in the 7th, 8th, 9th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 20th, and 21st articles of the said answer are immaterial and irrelevant.

3. The master of the *Patria* waived and dispensed with the tender of any general average contribution and the production of the copies of the bills of lading referred to in the said answer.

4. By the law of Hanover and of the North German Confederation the master

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of the *Patria* was not justified in doing what is complained of in the plaintiffs' petition.

The case came on for hearing on the 21st of April, and the hearing was continued on the 4th, 6th, and 8th of May. It appeared from the evidence that the *Patria* was a North German three-masted schooner of about 288 tons register, owned by the defendants, who were subjects of the North German Confederation, and domiciled in North Germany. In June, 1869, the *Patria* was at the port of Bordeaux, and about to sail on a voyage to Guayaquil; and on the 29th of that month her owners, by their agents at Bremen, chartered the vessel to Möller & Sons, a German firm carrying on business at Bremen "for a voyage back from the west coast of Central America direct to a port on the Continent between Havre and Hamburg and Bordeaux inclusive, or a port of Great Britain." The charterparty was in the German language. The following is a translation of such of the conditions of the charterparty as are material to the case:—

Said vessel to sail from Bordeaux to Guayaquil, and the captain is bound after having discharged the cargo there to proceed at once without delay to the roads of San José de Guatemala, there to await the orders of the charterers.

The charterers are bound to give said vessel a full and complete cargo on the coast of Guatemala of land products. The captain has for their benefit to sail to the loading places pointed out by them, but not to more than four places. The charterers reserve to themselves the right to load the vessel in the different loading places with cargo for San José, and from San José for the different places to discharge her there again. The captain has to apply everywhere to charterers or their agents, but is free of any address or commission.

The captain is bound, after having taken the cargo on board the said vessel, to sign bills of lading in proper form, be the freight higher or lower than the charterparty states, because he only receives payment according to the charterparty. After having received his despatch, the captain is to proceed with first favourable wind and weather to the port of destination, and to continue his voyage without delay, but without being responsible for sea damage, or fire, or dangers of sea, or other events caused by High Powers, or any other event of navigation.

After safe arrival at the port of discharge in Europe, and after having delivered the cargo well and in good condition, the charterers are bound to pay there to the captain, or to his order, the stipulated freight in full, without delay, say 1275*l.* sterling, for the whole voyage. If the vessel should be ordered from San José to Punta Arenas, charterers have to pay 50*l.* more freight.

For loading at the different places of Central America are given in all sixty running days, beginning with the day after the captain has declared himself ready for loading, the time of sailing to the different places not included, but still

the lay days have not to begin before the 15th of December, or before, only if charterers' agents, by earlier arrival of captain, think it desirable.

If the vessel is detained more than stipulated time there is to pay to the captain, or order, for every lay day, 6*l.* sterling, day by day, besides the freight.

The schooner proceeded to Guayaquil, and there having discharged her outward cargo proceeded, in pursuance of the charter to St. José de Guatemala, and there received orders from the agents of Möller & Sons to proceed to Champerico. She proceeded to Champerico, and there took in from Messrs. Edigoras & Ceballas the 1923 bags of coffee mentioned in the pleadings. For this coffee the master signed a bill of lading in the form set out in the second article of the answer. He signed five copies of the bill of lading, one he kept, the others he handed to the shippers. The schooner then proceeded to Tecojate in accordance with orders, where she took on board 1400 bags of coffee, which were consigned to Messrs. Isaac & Samuels at Hamburg. Messrs. Isaac & Samuels were a firm of merchants carrying on business in London. The bags of coffee taken in at Champerico and Tecojate were stowed in the lower part of the hold. From Tecojate the *Patria* proceeded back to San José de Guatemala, where she took in about 2477 bags of coffee, which were consigned to various consignees at Hamburg, and so completed her cargo. On the 5th of April, 1870, she sailed from San José de Guatemala for Hamburg. In the course of the voyage the master and one of the crew were attacked with scurvy, and became dangerously ill, and in consequence the schooner made for Falmouth, and, on the 23rd of August, put in there in order to obtain medical assistance. When on her course for Falmouth she was boarded by a cutter off Scilly, and received notice from the German consulate at Falmouth that war had broken out between France and Germany. On arriving at Falmouth the master and the other man ill with scurvy went ashore; the master after a short time recovered, the other man died the day after he went ashore. The master remained at Falmouth till the 9th of September, and then went to Hamburg. He did not return to Falmouth till the 1st of December.

On the 31st of March, 1870, Edigoras & Ceballas, the shippers of the 1923 bags of coffee in question, who carried on business in Guatemala, forwarded the bill of lading to the plaintiffs. The

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bill of lading was inclosed in a letter from Fdigoras & Ceballas to the plaintiffs, dated the 31st of March, 1870, the terms of which were as follows:—

We have yours of 16th February, and inclose bill of lading for 1923 bags coffee.

The coffee is quite at your disposal, and you are to sell it for our account at the best price you can, and when you think fit.

Please insure these packages against particular average.

At the time this letter was despatched, and at the time it was received, neither Fdigoras & Ceballas nor the plaintiffs knew anything about the charterparty. In the month of June the plaintiffs received a letter from Möller & Sons, dated the 1st of June, which was in these terms (1):—

As consignees and charterers of the German vessel *Patria*, from Guatemala to Hamburg, we observe by her manifest that there are 1923 bags of coffee shipped to your order; and as our market offers a favourable position for the sale of Guatemala coffee, we beg to offer you our services in this respect.

In answer to this letter the plaintiffs wrote to Möller & Sons on the 16th of July, 1870, as follows:—

In reference to your favour of 1st June in which you inform us that you are consignees and charterers of the German vessel *Patria* from Guatemala, as the disturbances on the Continent will probably close the port of Hamburg, please communicate with the owners as regards their wishes. It would, no doubt, be safer for the vessel to come to London; and, in the event of her doing so, we shall be most happy to take charge of her and her cargo on your account.

On the 27th of August the plaintiffs wrote again to Möller & Sons:—

The *Patria* having arrived at Falmouth from Guatemala, we address you as consignees and charterers of the vessel respecting our 1923 bags of coffee on board of her. The vessel is now unable to fulfil her contract and deliver our coffee at Hamburg. We therefore propose to bring all the coffee to London, in order to avoid delay and the deterioration that would probably occur were it to remain any time in the hold of a vessel.

We presume the captain would have no objection to deliver our coffee at Falmouth; and as you are the charterers, we shall feel obliged by your authorizing him to do so. Should we succeed in carrying out the above arrangement, what reduction in the freight may we look for in consideration of the extra expenses we shall be put to arising from the inability of the vessel to carry out her original contract?

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(1) The correspondence between Möller & Sons and the plaintiffs, was tendered in evidence by the plaintiffs' counsel; it was objected to by defendants' counsel, and admitted by the judge.

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On the 30th of August, Möller & Sons wrote to plaintiffs as follows:—

Your favours of 16th July and 27th inst. have been received. Regarding the discharge of the *Patria*, we think nothing can be done to this effect, as there are several consignees of cargo at Hamburg who, as well as their underwriters, would first have to consent to it. The owner of the *Patria*, Mr. F. D. Bischoff, of Vegesuck, Bremen, we think, would, if at all, only consent to a discharge at Falmouth in case he could deliver the whole cargo to the different consignees; but even then we see no reason why he should consent to an abatement in freight, nor would we as charterers agree to a deduction of freight, unless paid for by the owners.

Before receiving this last letter, the plaintiffs, on the 31st of August, wrote to their agents at Falmouth, Messrs. Broad & Sons, the following letter:—

We shall feel obliged by your seeing the captain of the vessel, and asking him if he is willing to deliver our coffee; and if so, what allowance he would be inclined to make from the freight, seeing that he is unable to deliver at destination, owing to the war.

Can the coffee be delivered overside into a steamer? Any information you can give us will be acceptable. If the captain or the owner of the freight refuses to deliver in Falmouth, we think they might be compelled to take the cargo to a market such as London, or they must be liable for detaining a perishable article of this nature.

The next day, the 1st of September, 1870, after the receipt of the letter from Möller & Sons of the 30th of August, the plaintiffs again wrote to Broad & Sons, as follows:—

Referring to our letter of yesterday, we have to-day received a letter from Messrs. Möller & Sons, charterers of the *Patria*, positively refusing to allow any abatement in the freight on our coffee. We therefore leave you to arrange with the captain if the 1923 bags can be taken out of the vessel on payment of freight, and transshipped to London. We must, of course, only pay freight to whom it is due on delivery of the whole of our parcels complete and in good order (damage by sea-water being excepted).

Messrs. Broad & Sons, upon receiving these letters from the plaintiffs, gave them to one of their clerks, who went to the master of the *Patria*, and read the letters to him, and told him that if he would deliver the bags of coffee at Falmouth the bill of lading freight should be paid the same as if the goods were discharged at Hamburg.

The master refused to deliver the cargo; he said he could not do anything without Möller & Sons' consent. The master did not make any demand for any sum of money over and above the

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freight offered, and did not ask for the bill of lading. The plaintiffs wrote to Möller & Sons the following letters on the days on which they respectively bear date.

2nd of September, 1870.

We have received your letter of the 30th of August, and note that you decline to make any reduction on the freight of our 1923 bags per *Patria*, now detained at Falmouth, though we are willing to receive them there instead of compelling the ship to proceed with her cargo to the port of destination, Hamburg. We think this is hard upon us under the circumstances; nevertheless, we submit, rather than allow a delicate article like coffee to remain an indefinite time on board ship.

If you will, then, as charterers, authorize the captain to deliver us our coffee, we will pay freight as per bill of lading. In such case, please to authorize the captain to receive the freight and to give us a discharge.

Your immediate answer will oblige us, so that we may see our underwriters. If we cannot get delivery of our coffee on payment of full freight as proposed, we hereby give notice that we hold the ship, her owners, charterers, and all concerned, liable for all loss and damage whatsoever.

From the plaintiffs to Möller & Sons, Bremen:—

12th of September, 1870.

On the 2nd instant we wrote you with reference to 1923 bags of coffee, per *Patria*, but are still without reply to that letter.

We shall feel obliged by your sending orders to the captain of the vessel authorizing him to deliver our coffee at Falmouth, against bill of lading and payment of freight as therein agreed; we are much put out by the delay that has occurred, and trust you will let us hear at once that you have given the necessary instructions to the captain.

As we wrote before, if the captain still persists in not delivering, we must hold him, you, the ship and all concerned, liable for any damage or deterioration that may occur, as the vessel is bound to give up her cargo or take it to a market of safety if she cannot proceed on her intended voyage.

* * * * * * * *

We hereby offer to pay freight in full at Falmouth, just as if coffee were delivered at Hamburg, and we must really insist on getting our coffee without delay. If you refuse, we hold you responsible.

Möller & Sons wrote to the plaintiffs, in answer, as follows:—

Bremen, 15th of September, 1870.

In reply to your favours of 2nd and 12th instant, we beg to state that we, as charterers of the *Patria*, are not at all in the position to give any instructions to the captain. The latter must know, himself, what to do under present circumstances, according to German law, the only law in question in this affair; the *Patria* being a German vessel, and destined for a German port, we believe that the captain has even no right to discharge part of his cargo at Falmouth.

On the 20th of September the *Patria* still remaining at Falmouth, with her cargo on board, the clerk of Messrs. Broad & Son,

acting in pursuance of instructions from the plaintiffs, had another interview with the mate, who was in charge of the ship in the absence of the master, who had gone to Hamburg as before stated. He told the mate that if the vessel would not proceed on the voyage, the plaintiffs would accept delivery of their coffee at Falmouth, and would pay full freight for it. The mate said he had instructions not to deliver the cargo without the written consent of Möller & Sons.

On the 7th of November the suit was instituted, and the *Patria* was arrested at Falmouth on the 9th. On the 9th of December an order was made by the judge that the 1923 bags of coffee should be discharged and delivered to the plaintiff on payment into court of the amount of freight, and upon the plaintiffs giving a bond for the expenses occasioned by the delay. In pursuance of this order the coffee was delivered to the plaintiffs.

For the purposes of the case it was agreed that the following dates should be taken as proved:—

The declaration of war between France and Prussia, 19th of July, 1870.

The blockade of Hamburg notified the 15th of August, and subsequently altered to the 19th of August, 1870.

French vessels of war left the mouth of the Elbe, 11th of September, 1870.

Raising of blockade of Hamburg notified, 18th of September, 1870.

It was established by evidence, given on behalf of the defendants, that if the *Patria* had sailed for Hamburg after the 18th of September, she would even then have incurred some risk of being captured by French men-of-war cruising in the Channel and the North Sea. But the evidence was conflicting as to the probability of capture.

Mr. Travers, the vice-consul in London of the North German Confederation, who had passed through the course of study necessary to qualify him to act as an advocate or a judge in Germany, was called, as an expert, to prove the German law. He stated that the provisions of the German law applicable to the case were contained in the German Mercantile Code, Fifth Book, "Concerning Maritime Commerce;" and that a correct translation of

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that portion of the code was contained in Mr. Wendt's book on Maritime Legislation. (1) Mr. Travers stated that if the master had sailed to Hamburg after the war had broken out he would not have done anything contrary to German law. The following is Mr. Wendt's translation of those portions of the articles of the German Code upon which the defendants mainly relied:—

Art. 504. The master shall at the same time take every possible care of the cargo during the voyage, in the interest of those who are concerned therein.

When special measures are required in order to avoid or lessen a loss, it is his duty to protect the interests of those concerned in the cargo, as their representative; to take their instructions, if possible, and, as far as circumstances admit, to carry the same into effect; otherwise, however, to act according to his own discretion, and generally to take every possible care that those interested in the cargo are speedily informed of such occurrences, and of the measures thereby rendered necessary.

He is in such cases particularly authorized to discharge the whole or a portion of the cargo; in the most extreme cases, if a considerable loss on account of imminent deterioration or other causes cannot be otherwise averted, to sell or hypothecate it for the purpose of providing means for its preservation and further transport; to reclaim it in the case of capture or detention; or, if it shall have been otherwise withdrawn from his charge, to take all extra-judicial and judicial steps for its recovery.

Art. 505. When the prosecution of the voyage in its original direction is prevented by an accident, the master is at liberty either to continue the voyage in another direction, or to suspend it for a shorter or longer period, or to return to the port of departure, according to the circumstances, and to the instructions received, which latter are to be adhered to as far as possible.

In the case of the cancelling of the contract of affreightment, he shall act according to the provisions of Art. 634.

Art. 583. When the voyage has been commenced in the sense of Art. 581 (1), the charterer can only withdraw from the agreement, and demand the unloading of the goods, on paying the full freight as well as all other claims of the shipowner. . . . .

In case of such unloading the charterer shall not only pay the additional expenses thereby incurred, but also indemnify the shipowner for the loss caused by the delay.

Art. 588. . . .

2. In the case contemplated by articles 582 and 583, the charterer cannot demand the unloading of his goods if his voyage would thereby be delayed, or a

(1) Papers on Maritime Legislation, with a translation of the German Mercantile Law relating to Maritime Commerce, by Ernst Emil Wendt. London, Longmans & Co., 1868.

(2) The voyage shall be considered as having been commenced: 1. When the charterer has already given the master his sailing orders; 2. When the charterer has already delivered the cargo entirely, or in part, and the lay-days have expired, Art. 581.

transshipment be necessitated, except with the consent of the whole of the charterers concerned. The charterer shall, besides, repay all costs, and make good any loss caused by such unloading.

Art. 631. Either party can withdraw from the contract (*of affreightment*) without being liable for damages :

1. When, before the commencement of the voyage :

The vessel is placed under embargo, or taken possession of for the service of the country or a foreign power :

The trade with the port of destination is prohibited :

The loading port or the port of destination is blockaded :

The exportation of the goods, to be shipped according to the contract of affreightment, from the port of loading, or their importation into the port of destination is prohibited :

The vessel is by a government order prevented from putting to sea, or the voyage, or the transmission of the goods to be shipped according to the contract of affreightment, is prohibited.

In all the foregoing cases, however, the government order justifies the withdrawal of the contract only when the impediment that has arisen is apparently not of short duration.

2. When, before the commencement of a voyage, a war has been declared, in consequence of which the vessel, or the goods to be shipped according to the contract of affreightment, or both, can no longer be considered free, and would be liable to risk of capture. . . . .

Art. 634. The dissolution of the contract of affreightment alters nothing in the obligation of the master to take care of the cargo in the absence of the interested parties, even after the loss of the vessel (articles 504–506). The master is, therefore, justified and obliged, and in urgent cases even without previous inquiry, as circumstances may require, either to forward the cargo to the port of destination in another vessel for account of the parties concerned, or to have it stored, or sold, and in case of its being forwarded or stored, to sell a portion of the same for the purpose of realizing the funds necessary thereto, and to its preservation, or in case of its being forwarded, to take a bottomry bond on the whole or part of it. The master is, however, not obliged to part with the cargo, or to deliver it to another master for the purpose of its being forwarded, unless the distance freight as well as all other claims of the shipowner, and the contributions due from the cargo for general average, salvage and assistance, and bottomry, have been paid or secured. The shipowner is answerable for the fulfilment of the duties devolving on the master according to the first section of this article, to the extent of his ship, so far as anything has been saved of it and of the freight.

Art. 636. When, subsequent to the commencement of the voyage, any of the incidents occur to which reference is made in Art. 631, either party has a right to withdraw from the contract without being liable to damages.

When, however, any of the incidents mentioned in Art. 631, No. 1, have occurred, the parties have, before being able to withdraw, to wait for the removal of the impediment, three or five months respectively, according as the vessel is in a European or in a non-European port.

Such period shall be calculated from the day of receiving notice of the impediment, if the master is then at a port, or from that day on which, after having received such notice, he first reaches a port with the vessel.

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The discharge of the vessel shall, in default of an agreement to the contrary, take place at the port at which it is staying at the time of the receipt of the notice of withdrawal. The charterer is bound to pay a distance freight for such portion of the voyage as is actually performed.

When, in consequence of such impediment, the vessel has returned to the port of departure, or to any other port, in calculating the distance freight the nearest point to the port of destination which the vessel had reached shall be taken as the basis for ascertaining the distance actually performed.

The master is likewise bound to act, in any such cases, before and after the dissolution of the contract of affreightment, in the interest of the cargo, in conformity with the articles 504-506, and 634.

Art. 637. When the vessel, after taking in its cargo, is detained in the port of loading before the commencement of the voyage, or in an intermediate port, or in a port of refuge after its commencement, by any of the emergencies mentioned in Art. 631, then the expenses of such detention (even if the requirements of general average are not present) are divided among the ship, freight, and cargo, according to the principles of general average, whether the contract is thereby put an end to, or afterwards completely fulfilled. The expenses of the detention include all the expenses enumerated in the second clause of Art. 708, No. 4; but those of putting into and leaving port only when the vessel has put into a port of refuge on account of the obstacle.

Art. 641. Should the contract of affreightment be dissolved, pursuant of Art. 630–636, the expenses of unloading from the vessel are borne by the shipowner, and all other expenses of the discharge by the charterer. When, however, the cargo only has been affected by the incident, the whole of the expenses of the discharge are borne by the charterer. The same rule applies when, in the case of Art. 638, a part of the cargo is discharged. When, in such a case, it was necessary to put into a port for the purpose of discharging, the charterer shall also bear the port charges.

Art. 643. Should the contract not extend to the whole of the vessel, but only to a proportionate part, or to a specially defined space of the same, or to a general cargo, the articles 630–642 apply, subject to the following modifications, viz.: 1. In the cases of articles 631 and 636, either party is justified in withdrawing from the contract immediately after the occurrence of the impediment, and without regard to its duration. . . . .

Art. 647. The master is bound to deliver the goods in the port of discharge to the legal holder of even one copy of the bill of lading only. As legally entitled to receive the goods, is to be considered the party who is designated as consignee in the bill of lading, or to whom the bill of lading, in case it is issued to order, has been transferred by endorsement.

Art. 653. The bill of lading is decisive for the legal position of the shipowner and the consignee of the goods towards each other; more especially the delivery of the goods to the consignee shall take place in accordance with the contents of the bill of lading. Provisions of the contract of affreightment not embodied in the bill of lading have no legal effect as against the consignee, unless special reference has been made to them. When such reference has been made respecting the freight to the contract of affreightment (for instance, by the words "freight as per charterparty"), the stipulations as to the time for discharging, the days on demurrage, and the demurrage are not considered to be therein included. As

regards the legal position of the shipowner and the charterer towards each other, the clauses of the contract of affreightment remain conclusive.

Art. 661. After a bill of lading has been issued to order, the master cannot comply with any instructions of the shipper concerning the returning or delivery of such goods, unless all copies of such bill of lading are returned to him. The same rule applies to any demand made by the holder of a bill of lading for delivery of goods previous to the arrival of the master at the port of destination. Should he act in contravention of these provisions, he remains liable to any legal holder of the bill of lading. In case the bill of lading has not been issued to order, the master shall return or deliver such goods even without the production of a bill of lading, if the shipper and the consignee named in such bill of lading have expressed their proper consent to the returning or delivery of such goods. When, however, all copies of the bill of lading are not returned, the master can previously demand security for any losses which might arise in consequence thereof.

Art. 708. . . .

4. If the vessel has put into a port of refuge in order to avoid a common danger threatening the ship and cargo in case the voyage were prosecuted, more particularly if the putting into port is in order to repair damage done to the ship during the voyage.

To general average belong, in this case, the expenses of entering and leaving, the expenses attaching to the ship itself during the stay, the wages and provisions of the crew during the stay, also the expense of lodging the crew on shore if and as long as they could not remain on board; further, if the cargo must be discharged as a consequence of the cause which led to the ship putting into the port of refuge, the expense of discharging and reshipping, and the expense of warehousing the cargo on shore up to the time when it might have been put on board again. . . .

Butt, Q.C., and *Cohen*, for the plaintiffs. It is stated, in the 22nd article of the answer, that the Court has not jurisdiction to entertain the suit; but the decision in the case of *The Bahia* (1) is conclusive in favour of the jurisdiction: *The Danzig*. (2)

The defendants seek to attach importance to the charterparty, and in the 20th article of the answer they allege that the master, in signing and delivering the bill of lading, acted as agent for the charterers, and not as agent for the owners. This proposition cannot be supported, for where a ship is under charter the master, in signing bills of lading, acts as the agent both of the owner and the charterer, unless the charter operates as a demise of the ship. The charterparty in this case did not amount to a demise: *Newberry* v. *Colvin*. (3) The plaintiffs had no notice of the charter, and the defendants allowed the master to be held out as the person representing the ship. They cannot now shelter themselves

(1) Br. & Lush. 61. (2) Br. & Lush. 102; 32 L. J. (P. M. & A.) 164.
(3) 7 Bing. 190.

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behind the charter: *Sandeman* v. *Scurr.* (1) The defendants could not avail themselves of this defence in a personal action; still less can the defence avail in the present action, which is a proceeding in rem against the ship.

With reference to the main point, the plaintiffs rest their case upon the plain terms of the bill of lading. The defendants contend that the law of the flag must be invoked, in order to introduce terms not expressed in the bill of lading, and they rely upon the decision in *Lloyd* v. *Guibert.* (2) The reasoning adopted in the judgment delivered in *Lloyd* v. *Guibert* (2) is, it is submitted, not in all respects satisfactory. It assumes that there is no such thing as a general maritime law, common to all maritime nations; but this Court has always recognized the existence of a general maritime law, founded upon general maritime usage. Again, the attempt made in the judgment to distinguish the decision in *The Hamburg* (3), upon the ground that the question in *The Hamburg* (3) was one of evidence and procedure is, it is submitted, open to criticism.

It is contended that, when an express contract is made between an English and a German subject, the obligations of the parties, as defined by the contract, cannot be modified in any way by the provisions of German law—certainly not in cases where the contract is made outside of German territory. This proposition is quite consistent with the actual decision in *Lloyd* v. *Guibert.* (2) That case only decided that the law of the flag is to be invoked in cases where the obligation cannot be gathered from the expressed intention of the parties. The action in *Lloyd* v. *Guibert* (2) was founded upon a promise which had no existence except by implication of law: *Duncan* v. *Benson.* (4) But the present case is widely different. Here an express contract was entered into between the parties to define the obligations under which each was to be placed. There is no need to invoke German law, because "the contract itself is the touchstone of the legal right." Moreover, the facts negative any presumption that the parties intended to import into the contract terms implied by German law. The

(1) Law Rep. 2 Q. B. 86.
(2) Law Rep. 1 Q. B. 115.
(3) 2 M. P. C. (N.S.) 289; 33 L. J. (P. M. & A.) 116.
(4) 1 Ex. 537; 17 L. J. (Ex.) 238.

bill of lading is in the English language, in the English form; the weights mentioned are English weights; the freight is made payable in English money; the goods are to be delivered to English merchants, domiciled in England. If, indeed, the question at issue were not determined by the very words of the contract, and it were necessary to resort to law to define the obligation of the parties with reference to some matter incidental to the contract, it is contended that the English law, or at all events the general maritime law, is the law which, in accordance with the presumed intention of the parties, should be invoked.

It is said that the charterparty is in the German language; but it is clear that, according to German as well as English law, the bill of lading determines the relation of the parties: *Smith* v. *Sieveking* (1); German Code, art. 653. The bill of lading stipulates that the dangers of the seas only shall be excepted. That stipulation excludes other exceptions, such as the restraint of princes. If it had become illegal for the master to carry out the contract, then different principles might have been applicable; but it is clear that it was not illegal for the master to sail to Hamburg. He refused to proceed to Hamburg simply because of an unforeseen danger, against which the bill of lading did not provide. It may be said that the plaintiffs did not require him to proceed on his voyage; but he was bound to proceed without any express demand being made. It is true that the plaintiffs were willing to accept the cargo at Falmouth; but that was only an alternative offered to the master. No doubt practically the real breach of which the plaintiffs complain is, that the master refused to deliver the goods at Falmouth. That breach is sufficient to support the plaintiffs' case. When the master had abandoned all intention of proceeding to Hamburg during the continuance of the war, he conferred upon the plaintiffs the right to demand the goods on payment of pro ratâ freight. This they did, and their demand was refused; and the refusal constitutes a breach of duty of which this Court will take cognisance.

Milward, Q.C., and *E. C. Clarkson*, for the defendants. The charterparty was the foundation of the whole adventure, and in effect it excepts the restraints of princes. The master had no

(1) 5 E. & B. 589.

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authority to contract his owners out of the protection they had stipulated for by the charterparty. But, independently of the question of the authority of the master, the charterparty is important as evidence of the intention of the parties. The charterparty was made in Germany, in the German language, between German subjects, and related to the employment of a German ship. It cannot be doubted that the presumption naturally arises that it was the intention of the parties to the charterparty that German law should govern. If so, it is unreasonable to suppose that the master intended, in signing the bills of lading, to depart from this intention, and to introduce a law to govern the rights of the parties to the bill of lading different from that which was intended to govern the rights of the parties to the charterparty.

The line of reasoning adopted in the judgment in *Lloyd* v. *Guibert* (1) cannot be impeached, and the decision has been approved by this Court and the Privy Council in *The Bahia* (2) and *The Karnak*. (3) The principles laid down in *Lloyd* v. *Guibert* (1) are distinctly applicable to this case, and *The Bahia* (2) is a case on all-fours with the present. Even adopting the limited construction put upon the decision in *Lloyd* v. *Guibert* (1) by the plaintiffs' counsel, the decision is applicable to the present case. The breaches complained of are: 1st. That the master did not deliver at Hamburg. 2nd. That he did not deliver at Falmouth. The evidence adduced in support of the first breach establishes nothing more than this at the most—that the master was guilty of unreasonable delay. He never refused to go to Hamburg; indeed, he was anxious to go as soon as he safely could. The bill of lading is silent as to time, and the only obligation the master was under to proceed within a reasonable time was an obligation implied by law. As regards the second breach—and this is the breach really relied upon by the plaintiffs—it is clear there was no obligation to discharge at Falmouth under any circumstances other than the obligation implied by law. If, then, the plaintiffs are proceeding for a breach of an implied obligation, the whole of the argument founded upon the supposition that the obligations of the parties

(1) Law Rep. 1 Q. B. 115. (2) Bro. & Lush. 61.
(3) Law Rep. 2 P. C. 505.

were defined by express contract is baseless, and it is erroneous to suppose that the exception in the contract, "dangers of the sea only excepted," can have any application. The exception was introduced as an exception to the express terms of the contract to carry to Hamburg. The implied contract to carry within a reasonable time is distinct from the contract to carry: *Taylor* v. *Great Northern Ry. Co.* (1) The express exception that applies to the one can have no application to the other. How is it possible to suppose that the express exception in the contract can in any way apply to the alleged implied obligation to deliver at Falmouth? The breaches of which the plaintiffs complain are breaches of obligations which do not exist, unless they are imposed by law. Some law must be invoked to impose these obligations, and *Lloyd* v. *Guibert* (2) is a distinct authority that the law of the flag must be looked to.

There is nothing in the case to shew that it was the intention of the parties that any other law than the law of the flag should govern. The circumstance that the bill of lading was in the English language is explained by the fact that the English language is the commercial language of the world. The contract was made, not with the plaintiffs, but with Fdigoras & Ceballas, who were not Englishmen; the destination of the ship was German; and but for the accident that, owing to the illness of the master and one of the crew, the ship put into Falmouth, this Court would have had no jurisdiction to entertain the suit.

If the German law applies, the defendants have committed no breach. The master was not bound to deliver the goods until a distinct demand was made, accompanied by a tender of freight: Art. 583. No distinct demand for the goods, and no formal tender of the freight, were ever made. Freight was not even offered: except upon condition that the authority of Möller & Sons should be produced. Further, the master was bound not to deliver up the cargo until the plaintiffs had paid their share of the expenses of the detention: Art. 637. The master had possession, as part of the cargo, of the goods of the other consignees, and he was bound towards those consignees to retain possession of the plaintiffs' goods till the plaintiffs' share of the expenses had been paid. It

(1) Law Rep. 1 C. P. 385. (2) Law Rep. 1 Q. B. 115.

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cannot be said there is any evidence of waiver on the part of the defendants of payment of these expenses. The matter was never discussed, or even mentioned, and there could not be any waiver of a condition which the defendants were not ready and willing to perform: *Dirks* v. *Richards* (1); *Jones* v. *Cliff.* (2) Again, the master was bound by Art. 661 to retain the cargo till all the four copies of the bill of lading delivered to the shippers were produced to him.

Butt, in reply. The German law does not apply; but even if it does, the plaintiffs are still entitled to the judgment of the Court. The plaintiffs offered to pay full freight. The offer was refused, and the necessity for a formal tender was dispensed with. As to the expenses of detention, the master did not demand them, and the plaintiffs cannot be blamed for not offering to pay what was not demanded, and what was due, if at all, by virtue of the provisions of a law with which they were unacquainted. The objection that all the copies of the bill of lading were not produced is a technical objection to which no weight can be attached. It does not appear that they were demanded. The bill of lading is not "issued to order" within the meaning of Art. 661. The plaintiffs held one of the copies of the bill of lading, and the production of that would have been sufficient, for the bill of lading itself expressly provides that one being accomplished, the others are to stand void: *The Tigress.* (3) But the master dispensed with the performance of all formalities on the part of the plaintiffs by stating in terms that he would not give up the goods without the express authority of Möller & Sons. This condition he had no right to impose, because by Art. 504 he himself had full authority to act, and was bound to act for the interests of all concerned.

Cur. adv. vult.

June 6. SIR ROBERT PHILLIMORE. This is a suit by Messrs. Chalmers, Guthrie & Co., consignees under a bill of lading of 1293 bags of coffee lately laden on board the ship *Patria*, for damages against that ship on the ground of a breach of the contract contained in the bill of lading. The *Patria* is a ship sailing under the flag of

(1) 4 M. & G. 574. (2) 5 C. & P. 560.
(3) Bro. & Lush. 38.

the North German Confederation, belonging to a port in Hanover. In the month of March, 1870, she was chartered to Messrs. Möller & Sons, of Bremen, and was lying in the port of Champerico, Guatemala, when a person of the name of Ceballas, who, I presume, was an American Spaniard, shipped on board her the coffee above mentioned, to be carried to Hamburg, on the terms of a bill of lading signed and delivered by the master, which is as follows:— [Here the learned Judge read the bill of lading.]

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Five copies of the bill of lading were signed by the master, four of which were delivered to Ceballas. One of these was delivered by Ceballas to the plaintiffs. Other goods were also shipped for Hamburg by other persons. The ship sailed on the 5th of April. On the 23rd of August she arrived in the English Channel with some of her crew, including the captain, seriously ill, and on the same day she put into Falmouth. Before this time war had broken out between the North German Confederation and France; and Hamburg was blockaded from the 19th of August, before the arrival of the vessel, until the 18th of September. On the 7th of November the suit was instituted in this Court; and in substance the petition charges the defendants with two distinct breaches of contract, namely, refusal to deliver the coffee of the plaintiffs at Hamburg and at Falmouth.

The question, by what law such charges are to be tried, may, according to the circumstances of each case, be one of nicety and difficulty. The law of the place in which the contract was entered into (lex loci contractus), that of the place in which it is to be performed (lex loci solutionis), that of the state to which the shipowner belonged, usually called the law of the flag, the general maritime law administered by the comity of all states; the law of the tribunal in which the suit is instituted (lex fori), are the laws upon one of which the attack or defence is usually founded. In the present case the defendant has relied principally upon the law of the flag. The plaintiff maintains that the contract itself furnishes by its own terms the law applicable to his case from whatever source the law so furnished be derived, but he contends that if any law without the contract is to be imported it is the general maritime law. The proposition that the terms of the contract furnish, per se, the law in this case, raises the first question to be

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considered; the propositions of jurisprudence applicable to it appear to me the following:—

1. That the rights and obligations of the parties to a contract are to be determined by the law which they have declared themselves to intend. 2. That where there is no express declaration of intention, the presumption as to the law contemplated by the parties must be gathered from the circumstances of the case. 3. That where the contract is plain in its language, that language must receive the ordinary and natural construction, and does not admit the introduction of a law dehors the contract. 4. That the contract must be executed according to its terms, or abandoned with due compensation to the party injured, unless supervening unforeseen circumstances of a certain character have rendered the execution legally impossible, as where the port of destination has become the port of the enemy of the state to which the shipowner belongs. And here I must observe that there is no question in this case, as in the recent case of *The Teutonia* (1), as to the fulfilment of a contract being prevented by a legal impossibility or by the necessity of a compromise between a public and private duty. 5. That the happening of unforeseen events may, according to the circumstances, justify a reasonable delay in the execution of a contract which does not infer the abandonment of it.

I will now apply these propositions to the facts of the case before me. During the interval between the arrival of the ship at Falmouth on the 23rd of August, and the institution of the suit on the 7th of November, the ship remained in the port of Falmouth. The captain was absent from Falmouth from the 9th of September to the 1st of December, when he returned to his ship. It has not been contended by the plaintiffs that there was any breach of contract in the deviation to Falmouth, caused by the illness of the master.

There are some other outlying objections taken on the part of defendants which it will be convenient to dispose of in this place. It is objected that the proceedings should have been against the charterer, and not the owner. But I am of opinion that this objection cannot avail, for two reasons: First, The owner of the ship cannot release himself from his liability by chartering his

(1) Ante, p. 394.

vessel without the consent of the owner of the goods. In this case there is no demise of the ship. The master receives freight as agent for the owner as well as the charterer: *Sandeman* v. *Scurr.* (1) Secondly, The proceeding here is in rem: the maritime lien attached under this statute as soon as the ship was arrested.

Another objection is as to the jurisdiction of the Court under s. 6 of 24 Vict. c. 10. It is said that the goods in this case are not "carried into any port of England or Wales," because Falmouth was not the port of destination. In the first place, this objection should have been taken under protest: in the next place, it has been already raised and disposed of by my predecessor, in whose judgment I entirely concur; and which, as it applies closely to the present case, I will state. That learned judge said, "Here then is a cargo originally destined to be imported into the port of Dunkirk; in consequence of accident the ship puts into the port of Ramsgate, and the master refuses to carry on the cargo to Dunkirk or to give delivery at Ramsgate. That this is a great grievance cannot be denied, and the Court ought to give, if necessary, great latitude to the construction of the Act of Parliament, in order to extend the remedy to this case. However, it appears to me that this section was carefully worded to give the utmost jurisdiction in the matter. It uses the words 'carried into any port in England,' and does not use the word 'import,' I apprehend the phrase 'carried into' was advisedly used instead of the word 'import.' Then it goes on, 'or for any breach of duty or breach of contract.' Here there is a clear breach of contract and breach of duty. I am of opinion that without any violence of construction the statute applies to this case:" *The Bahia.* (2)

Another objection was, that the master had no power under the charterparty "to contract," as it was expressed, "his owner out of that charterparty." But I am not of that opinion; and upon this point I adopt the language of the Court of Queen's Bench in the case, already cited, of *Sandeman* v. *Scurr.* (1) Lord Chief Justice Cockburn, in delivering the judgment of the Court, said: "We think that, so long as the relation of owner and master continues, the latter, as regards parties who ship goods in ignorance of any arrangement whereby the authority ordinarily incidental to that relation is

(1) Law Rep. 2 Q. B. 86. (2) Bro. & Lush. at p. 62.

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affected, must be taken to have authority to bind his owner by giving bills of lading. We proceed on the well-known principle that, where a party allows another to appear before the world as his agent in any given capacity, he must be liable to any party who contracts with such apparent agent in a matter within the scope of such agency. The master of a vessel has, by law, authority to sign bills of lading on behalf of his owners. A person shipping goods on board a vessel, unaware that the vessel has been chartered to another, is warranted in assuming that the master is acting by virtue of his ordinary authority, and therefore acting for his owners in signing bills of lading. It may be that, as between the owner, the master, and the charterer, the authority of the master is to sign bills of lading on behalf of the charterer only, and not of the owner. But, in our judgment, this altered state of the master's authority will not affect the liability of the owners, whose servant the master still remains, clothed with a character to which the authority to bind his owner by signing bills of lading attaches by virtue of his office. We think that, until the fact that the master's authority has been put an end to is brought to the knowledge of a shipper of goods, the latter has a right to look to the owner as the principal with whom his contract has been made." (1)

I should mention that it appears, from the correspondence between Möller & Sons and the plaintiffs, that the plaintiffs were apprised, by a letter from Bremen dated the 1st of June, that Möller & Sons were the charterers and consignees of the vessels; and on the 16th of July the plaintiffs wrote to Möller & Sons as follows:—[Here the learned Judge read the letter of the 16th of July, 1870, set out above.] I am of opinion that the contract contained in the bill of lading cannot be affected by the terms of the charterparty. The English (*Smith* v. *Sieveking*) (2), I may observe, and the German laws are equally clear on this point. According to art. 653 of the German code, "the bill of lading is decisive for the legal position of the shipowner and the consignee of the goods towards each other; more especially, the delivery of the goods to the consignee shall take place in accordance with the contents of the bill of lading. Provisions of the contract of affreightment not embodied in the bill of lading have no legal

(1) Law Rep. 2 Q. B. 96, 97. (2) 5 E. & B. 589.

effect as against the consignee unless special reference has been made to them; when such reference has been made, respecting the freight, to the contract of affreightment (for instance, by the words 'freight as per charterparty'), the stipulations as to the time for discharging, the days on demurrage, and the demurrage, are not considered to be therein included."

The German expert who has been examined explained this law in its natural sense. Moreover, the 2nd article of the answer in this suit refers to the shipment as having taken place on the terms of a bill of lading. The bill of lading in this case is in the usual form of an English bill of lading. If this instrument had specified that the English law should govern the construction of it, it could not have been maintained that the bill of lading would not have been subject to this law. But it is contended that the intention of the parties to the contract that the English law should govern cannot be inferred from the facts that the language, form, and money for the freight are English, and the consignees English; while the other surrounding facts are, that the ship was German, the owners German, the charterparty German, the destination of the goods a German port, the shipper not English. All these facts shew, it is urged, that the law of the flag of the ship must prevail, and bring the case under the principle of the decision in *Lloyd* v. *Guibert*. (1)

I have been much pressed by counsel for the plaintiffs to pronounce that the decision in *Lloyd* v. *Guibert* (1) is not binding on the Admiralty Court, and also that that judgment errs in ascribing to the Admiralty Court the doctrine that the general maritime law is not an universal maritime law, binding upon all nations in time of peace, but a law which is to be derived from the practice and decisions of English tribunals. If it were necessary to decide the latter point (with all respect for the high authority of the tribunal which delivered the judgment), I should have hesitated a long while before I assented to the position that there was not a general maritime law, which, according to the comity of nations, was administered in the English as well as in the foreign Courts of Admiralty. I should have remembered and endeavoured to apply the law upon which Lord Stowell, in *The Gratitudine* (2),

(1) Law Rep. 1 Q. B. 115. (2) 3 Rob. 240.

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founds the authority of the master when acting as necessary agent for the owner of the cargo, and the language of Lord Tenterden, in *Simonds* v. *White* (1), as to the doctrine of average. "The principle of average," says that high authority, "is of very ancient date and of universal reception among commercial nations. The obligation to contribute, therefore, depends not so much upon the terms of any particular instrument as upon a general rule of maritime law." I should have referred to the judgment of Story (2) as to the ancient laws, customs, and usages of the sea, and have considered whether there was not a general maritime law founded upon them, and the recognized exposition of them wholly distinct from the common law of England, as the law by which, in cases of collision, the Admiralty Court finds both parties to blame is distinct from that of the Common Law Court which, upon its own principles, refuses to allow any such verdict to be given.

But in truth it does not appear to me necessary to make any decision on either of the points pressed upon me touching the authority of *Lloyd* v. *Guibert*. (3) That case related to the question of what law should be applied to events not contemplated by the contract; but in the case before me the contract is precise in its language, and does contemplate the happening of events which might impede the execution of the contract, and provides that, with one special exception, viz. "the dangers of the seas only excepted:" (*Kay* v. *Wheeler*) (4) such events shall not excuse the shipowner from the fulfilment of the contract. It has not been maintained that the German law would prevent a German shipowner from adopting any special form of contract; and I must presume that the German system of jurisprudence, like that of other states, would construe according to its plain meaning such a contract as the present. According to the natural construction of the language of this contract, the breaking out of the war did not relieve the shipowner from the obligation of fulfilling his contract.

The first breach of contract alleged is the not going to Hamburg in spite of the blockade, that is, before the 18th of September. It was contended that if the consignees were ready to take the

(1) 2 B. & C. 805, at p. 811.
(2) *De Lovio* v. *Boit*, 2 Gall. 398.
(3) Law Rep. 1 Q. B. 115.
(4) Law Rep. 2 C. P. 302.

risk, it was not competent to the master under the bill of lading to refuse to sail.

I think, however, that this breach was practically abandoned during the course of the argument, and I much doubt whether, having regard to the letter of the 16th of July, it could have been maintained. But after the 18th of September the shipowner was bound, and without any further demand by the terms of his contract, to continue his voyage. I do not mean to say that he was not entitled to a reasonable delay in order to decide as to what was the best course to pursue. What lapse of time may be included in a reasonable delay must depend on the circumstances of each case. In *The Teutonia* (1) and in the case of *Pole* v. *Cetcovich* (2), the delay was of two or three days. In this case fifty days elapsed before the suit was instituted, a period which I am of opinion exceeded the limits of the time during which the master was entitled to pause, and which constituted the unreasonable delay which was expressly found to be wanting in *Pole* v. *Cetcovich* (2), but which in the case before me made a complete breach of the contract. The expert distinctly stated that if the master had proceeded to Hamburg after the war had broken out he would not have violated any principle of German law. The contract therefore being plain, the circumstance of the war not relieving the defendants from the duty of executing it, and the delay being so unreasonable as to amount to a refusal to do so, the judgment must be for the plaintiffs, unless his conduct or that of his agents has deprived them of the right to claim it. That conduct must be gathered from the correspondence and the evidence taken before me. It amounts, I think, in substance to this. First, That the plaintiffs did not require the defendant to sail during the blockade of Hamburg, that is, before the 18th of September. Secondly, That after that date they did require the delivery of the goods at Hamburg unless the master would deliver them at Falmouth. But this alternative was offered to him by the plaintiffs. Their complaint is that the captain would neither fulfil the contract nor withdraw from it.

These observations bring me to the consideration of the second

(1) Ante, p. 394. (2) 9 C. B. (N.S.) 430.

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alleged breach of the contract, viz., the refusal to deliver the coffee at Falmouth.

If this question be triable by the English law, the contract was at an end by the refusal of the master to go to Hamburg, and the merchant was entitled to his goods, whether with or without payment of a pro ratâ freight. By the general maritime law the plaintiffs would, I think, have been entitled to their goods on the payment of a pro ratâ freight.

By the German law or the law of the flag (art. 631, 636-504) either party has a right to withdraw from the contract without being liable to damages, and it is the duty of the master to take the instructions of the owners of the cargo, and, as far as circumstances admit, to execute them, and (art. 641) the expense of unloading is to be borne by the shipowners, and other expenses of discharge by the charterer, and, as I understood the expert, a payment of "distance" freight—which is, I suppose, pro ratâ freight—is to be made. I must here observe, that though I do not doubt that Mr. Travers, the expert, efficiently discharges the duties of his consular office, he did not pretend to any knowledge of jurisprudence apart from the letter of the code, and was wholly unacquainted with any judicial decisions thereupon. The Court, therefore, is left very much to put its own construction upon the code, the translation of which by Mr. Wendt has been relied upon by the counsel on both sides. With respect to the German law, the first objection to the delivery of the goods raised by the defendants was that no direct demand had been made for the goods. It appears to me that the evidence proves that there was a sufficient demand. As to the second objection, that there was no sufficient tender of freight, I am of opinion that the contrary is proved. The clerk of Messrs. Broad & Son, the agents, said: "I told him" (that is, the master) "we would pay full freight, same as if the ship was discharged at Hamburg." As to the third objection, that all the bills of lading were not given up, a sufficient answer is, that the master never asked for the other bills of lading. This objection is, in the circumstances, purely technical; and it is very doubtful, to say the least, whether, according to the German law, he had any right to insist upon the other bills of lading in the case of such a bill of lading as the present, which is not the

one contemplated by the German code, and which was presented by the consignee named in the instrument itself. By the English law the master was certainly bound to deliver the goods to the holder of the bill of lading: *The Tigress.* (1)

The remaining and principal objection is, that these goods were put on board a general ship, and so stowed that they could not be delivered without disturbing the goods of other shippers; that the master is, by the German law, to exercise his discretion upon the subject, and that he had a right to exact their share of general average from the plaintiffs, which share was never tendered to him. Here, again, it may be answered that the demand for average was never made by the master, a remark which loses none of its force from the fact that this claim was made according to the foreign law, with which the English merchant could not be supposed to be conversant. Neither, I may observe in passing, was any demand made by the master for an indemnity. But, further, it appears to me that it was the duty of the master, under the German code, to deliver the goods: Art. 504. [Here the learned Judge read the article set out above.] It seems to me, however, that all these objections have been devised by the skill of counsel since the suit has been instituted; that the real objection urged by the master at the time was not the want of a proper demand or inadequacy of the freight tendered, or the want of security or indemnity, but the absence of consent on the part of the charterers. I do not think that the absence of this consent was a sufficient justification under the German law for the refusal to deliver the goods to the plaintiffs.

Upon all grounds, therefore, that the refusal was contrary to the plain stipulations of the contract, and after the tender of full freight was not justified, either by the law of the flag, or by the English law, or by general maritime law, I pronounce for the petition of the plaintiffs, with costs.

Solicitors for plaintiffs: *Thomas & Hollams.*
Proctors for defendants: *Clarkson, Son, & Greenwell.*

(1) Bro. & Lush. 38.

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Loss of Life—Damage caused by Collision—Claim for Compensation on behalf of an Infant en Ventre sa Mere.

A brig, by the negligence of those on board her, came into collision with a bark, on the 15th of January, about 5 A.M. off the Lizard. In the collision the main rigging of the bark was carried away, and shortly afterwards her fore and main masts went by the board. Towards evening the wind increased in violence, and about 2 A.M. the next morning the bark was driven on shore, and some of her crew were drowned :—

Held, that the loss of life was occasioned by the collision.

In a suit for limitation of liability, instituted on behalf of the owners of the brig, an appearance was entered on behalf of a child of one of the drowned men en ventre sa mere. The Court reserved leave to the child, en ventre, if born within due time, to prefer its claim for damages sustained by the death of its father. (1)

THIS was a cause of limitation of liability instituted on behalf of the owners of the brig *George and Richard* against Robert Alexander, the owner of the late bark *Eleutheria*, and of the cargo laden on board her (the plaintiff in a cause of damage entitled *The George and Richard* (No. 5612)), and against the master and others, the survivors of the crew of the *Eleutheria*, proceeding for their money, clothes, and private effects (the plaintiffs in a cause of damage entitled *The George and Richard* (No. 5630)); and also against all and every other person or persons whomsoever interested in the said vessels *George and Richard* and *Eleutheria*, or having any right, claim, or interest whatever with reference to, or arising out of a collision which occurred on or about the 15th of January, 1871, between the said vessels *George and Richard* and *Eleutheria*. The petition filed on behalf of the plaintiffs alleged in substance as follows :—

1. At the time of the collision hereinafter stated the plaintiffs were and now are the registered owners of the British brig or vessel *George and Richard*, which is registered at the port of Sunderland, in the county of Durham.

2. At the time of the collision hereinafter stated the defendant Robert Alexander was the registered owner of the late British bark or vessel *Eleutheria*, and of the cargo laden on board her at the time of the occurrence of the said collision.

3. On the 15th day of January, 1871, a collision took place at sea between the

(1) See *Smith* v. *Brown*, Law Rep. 6 Q. B. 729.

said brig *George and Richard* and the said bark *Eleutheria*, the Lizard light bearing at the time W.N.W., and being distant about fourteen miles. In the said collision the main rigging of the *Eleutheria* was carried away; and whilst the vessels were alongside each other the master of the *Eleutheria* jumped on board the *George and Richard*; but the vessels drove apart, and he was afterwards unable to return to his own ship. The *George and Richard* wore round to render assistance to the *Eleutheria*, but, owing to the darkness, the *Eleutheria* could not be found. Shortly after the collision the mate of the *Eleutheria* ordered her helm to be put up, and endeavoured to square the main yard, when the fore and main masts of the *Eleutheria* went by the board; her mizen was then set, and her head kept to the sea.

4. About 2 P.M. of the same day a ship came alongside the *Eleutheria* and offered her assistance, and afterwards a brig hove down and offered her assistance; and after the brig had left a pilot cutter came alongside, and a pilot from the cutter came on board the *Eleutheria*. The crew of the *Eleutheria* had thus ample opportunity of getting safe to shore, but they remained on board their ship.

5. At 2 A.M. of the next following (the 16th) day of the said month the *Eleutheria* struck on the rocks about a mile to the east of the entrance of the river Yealm, and there became a wreck. The crew of the *Eleutheria*, with the exception of five, whose names are unknown to the plaintiffs, and who were not again seen alive, got safely on shore.

6. At the time of the said collision, the said bark *Eleutheria* had a cargo of coal and the effects of her master and crew on board, and was bound on a voyage to the port of Point de Galle.

7. The defendant Robert Alexander, on the 19th day of January, 1871, instituted a cause of damage (No. 5612) in this Honourable Court against the said brig *George and Richard*, and the freight due or to grow due for the transportation of the cargo lately laden on board her, in the sum of 7000*l.*, to recover for the losses occasioned by the aforesaid collision of the *George and Richard* with the *Eleutheria*. The said brig *George and Richard* has been arrested in such cause, and remains in the custody of the Marshal of this Honourable Court.

8. The defendant James Gordon Burr was the master of the *Eleutheria* at the time of the said collision, and on the 1st day of February, 1871, a cause of damage (No. 5630) was instituted in this Honourable Court against the said brig *George and Richard* and her freight in the sum of 400*l.*, on his behalf as the master, and on behalf of others, the survivors of the crew of the said bark *Eleutheria*, to recover for their money, clothes, and private effects.

9. In addition to the said causes no others have at present been instituted; but the plaintiffs apprehend other claims in respect of the loss of personal effects and things on board the said barque *Eleutheria*, as also in respect of loss or damage to goods or merchandise on board the *George and Richard* at the time of the said collision.

10. The said collision took place without the actual fault or privity of the plaintiffs or any of them.

11. The plaintiffs admit that the collision occurred by reason of the improper navigation of the said brig *George and Richard*.

12. No loss of life or personal injury was caused by the said collision, or by reason of the said improper navigation of the said brig *George and Richard*.

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13. Under the circumstances herein appearing the plaintiffs offer to pay into the Registry of the High Court of Admiralty of England to the credit of this cause the sum of 2581*l.* 16*s.* 10*d.*, the aggregate amount of 8*l.* for each ton of the registered tonnage of the brig *George and Richard*, in pursuance of the Merchant Shipping Act, 1854 (part 9), and the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), s. 54.

14. The gross registered tonnage of the said brig *George and Richard* is 322·73 tons.

15. The plaintiffs also offer to pay into the Registry of this Honourable Court, to the credit of this cause, such interest as this Honourable Court shall think proper to award on the said aggregate amount of 8*l.* per ton.

By the prayer of the petition the Court was asked inter alia to direct that all proceedings in the said causes, numbered 5612 and 5630, be stayed, and the defendants, and all and every other person or persons whomsoever interested in the said bark *Eleutheria*, or in the cargo thereof, or in any losses or damages arising out of the said collision, be restrained from bringing any other action or actions, suit or suits, in respect of their said losses, and that all proper directions be given for ascertaining the persons who had any just claim in respect of loss or damage to ship's goods, merchandise, or other things caused by the said collision, and that proper directions be given for the exclusion of any claimants who should not come in within a certain time to be fixed for such purpose.

An answer to this petition was filed by proctors "for Elizabeth Noyes, of No. 26, Pennyfields, Poplar, in the county of Middlesex, the widow of Philip Noyes, deceased, and for the child of the said Philip Noyes, en ventre of the said Elizabeth Noyes, being some of the defendants in this cause." The answer stated, in substance, as follows:—

1. Philip Noyes was, at the time of the events hereinafter stated, carpenter on board the *Eleutheria*.

3. The *George and Richard* struck the *Eleutheria* just abaft the port fore-rigging, carrying away all the port main-rigging, and bringing down the main-topgallant mast. While the vessels were in collision together, those on board the *Eleutheria* repeatedly hailed the *George and Richard* to know her name. No answer being returned, the master of the *Eleutheria* said, "I'll see who this fellow is," and jumped on board the *George and Richard*. Immediately afterwards the two vessels parted. The *George and Richard* wore round to render assistance to the *Eleutheria*, but gave up looking for her after a few minutes.

4. The wind at this time was S.S.W., a fresh gale. Shortly after the collision the helm of the *Eleutheria* was put up, and endeavours were made to square the mainyard. At this time the mainmast went by the board, followed directly by

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the foremast. The helm was then put down, and the mizen set, and the ship was thereby brought head on to wind and sea.

5. About noon a ship came within hail under the lee of the *Eleutheria*, and, being asked, sent a boat with a warp to tow the head of the *Eleutheria* round, but the warp parted, and thereupon the ship sailed away without offering or rendering any other assistance.

6. Shortly afterwards a brig came up and offered assistance, and was thereupon desired to go to Plymouth and send out a steam-tug. The master of the brig promised to do this, and bore away in the direction of Plymouth.

7. At this time a pilot boat, being No. 5 of the Plymouth pilot boats, was in sight, and soon after, Edward Glinn, the master pilot thereof, boarded the *Eleutheria*, and stated that he thought his boat could tow her round. The pilot boat accordingly endeavoured to do so, but after something more than an hour's trial the warp broke. Thereupon it was arranged between the mate and the said Edward Glinn that the pilot boat should go into Plymouth for a steam-tug. At this time the *Eleutheria* was not making much water, and no immediate danger was apprehended by any one.

8. The said Edward Glinn remained on board the *Eleutheria*.

9. Towards night the gale increased considerably, the seas broke over the vessel, and the main hatch was knocked out of place. A little before 2 A.M. on the morning of the next day (the 16th) land was seen under the lee. It was then blowing a heavy gale. In a few minutes the *Eleutheria* went ashore about a mile to the E. of the river Yealm, on a rocky coast. Twelve of the seventeen hands on board, and the said Edward Glinn, were saved; the remaining five of the crew, one of whom was the said Philip Noyes, were drowned.

10. After the said collision all the orders were given by the first mate of the *Eleutheria*, and all the arrangements with the other vessels were made by him. He took command of the vessel in the master's absence.

11. The *George and Richard* arrived in Plymouth Harbour about 10.30 A.M. of the day of collision, bringing the master of the *Eleutheria* on board her. About 2.30 P.M. the master of the *Eleutheria* went out in the steam-tug *Secret* to look for the ship. The *Secret* continued to look for the *Eleutheria* until 7 P.M. If the *Secret* or any other steam-tug had met the *Eleutheria* she would have been able to take her in tow, and bring her safe to Plymouth.

12. Save as aforesaid, all the allegations contained in the 3rd, 4th, and 5th articles of the petition are untrue.

13. The allegations contained in the 12th article of the petition are untrue. In particular the loss of the life of the said Philip Noyes was caused by the said collision.

14. They admit the allegations contained in the 10th and 14th articles of the petition to be true.

By the prayer of the answer the judge was asked to pronounce that the plaintiffs were liable, in respect of loss of life or personal injury, to the amount of 15*l.* for each ton of the registered tonnage of the *George and Richard*.

A separate answer was filed on behalf of the defendant Robert Alexander. By this answer the solicitors for Alexander denied

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the truth of the allegations contained in the 12th article of the petition, and submitted that the plaintiffs ought to pay into court an aggregate amount at the rate of 15*l.* per ton for each ton of the registered tonnage of the *George and Richard*, and that the plaintiffs ought to pay into court interest on the amount of their liability from the time of the happening of the collision until the time of payment into court for distribution among the parties entitled thereto.

The solicitor for the plaintiffs pleaded, by way of reply, that Elizabeth Noyes and her said child en ventre had no just claim in respect of loss or damage caused by the collision in the said petition mentioned, and prayed that the pleadings might be concluded.

After these pleadings had been filed, the plaintiffs agreed to admit that the loss of the life of Philip Noyes was caused by the collision. (1) After this admission was made, appearances were entered on behalf of the administratrix of Henry William Holland, deceased, and the administratrix of Frederick Ellis, deceased, and on behalf of Joseph Brown, Thomas Newton, and James Higgins, survivors of the crew of the *Eleutheria*. The Court directed that further answers should be filed stating the circumstances giving rise to the claims made on behalf of the representatives of Holland and Ellis, and on behalf of Brown, Newton, and Higgins. Accordingly an answer was filed on behalf of the administratrix of Holland, and on behalf of the administratrix of Ellis. The answer alleged that Holland and Ellis were seamen on board the *Eleutheria*, and that the loss of their lives was caused by the collision. The answer was similar in form to the answer filed on behalf of Elizabeth Noyes and her infant en ventre. An answer was also filed on behalf of Brown, Newton, and Higgins, in which it was stated, in substance, as follows:—

The said Joseph Brown, Thomas Newton, and James Higgins were, at the time of the collision between the *George and Richard* and the *Eleutheria*, in the petition mentioned, seamen on board the *Eleutheria*.

Joseph Brown had his foot crushed by the fall of a boat belonging to the *Eleutheria* in the shock of the collision, and has been rendered thereby totally unfit

(1) Noyes was on board the *Eleutheria* when she went ashore, and was drowned. He was struck by a falling spar almost immediately after the collision. His leg was broken, and he was rendered so helpless that it was impossible for him to have escaped from the ship.

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for work up to this time, and the full extent of the damage done to him is not yet ascertainable.

Thomas Newton was struck on the chest by several spars in the breaking of a great sea over the deck of the *Eleutheria*, immediately after the collision, and was rolled along the deck by the force of the sea; and further had his foot jammed under the quarter-hatch, which had been washed off by the seas, and his ankle was put out, and he has been exceedingly ill ever since, and totally unfit for work, and the several injuries received by him are of the most serious nature.

James Higgins was struck by several spars in like manner, and his feet were severely bruised, and both his ankles so injured that he was unable to stand or walk for a fortnight afterwards; and the said James Higgins has not, in fact, yet been wholly recovered from the effect of the said injuries.

Such injury, or the greater part thereof, was received by them, the said Joseph Brown, Thomas Newton, and James Higgins, either during the actual collision or within a few minutes afterwards, and before the opportunities mentioned in the fourth article of the petition, of getting safe to shore, had been afforded to them.

In reply to the two last-mentioned answers the solicitor for the plaintiffs pleaded as follows:—

The loss of the lives of the said Henry William Holland and Frederick Edward Ellis was not caused by the said collision.

The loss of the lives of the said Henry William Holland and Frederick Edward Ellis was caused by the negligence of those on board the *Eleutheria*, and by the negligence of the said Henry William Holland and Frederick Edward Ellis.

The said Joseph Brown, Thomas Newton, and James Higgins did not receive personal injury, and if they did receive personal injury, it was not caused by the said collision.

On the 27th of March the case came on for hearing. The facts alleged in the 10th article of the petition were proved by affidavit. Witnesses were examined viva voce on behalf of the defendants, claiming in respect of the loss of the lives of Holland and Ellis, and on behalf of the defendants Brown, Newton, and Higgins. (1) On behalf of the plaintiffs, witnesses also were examined. The evidence given on behalf of the defendants was, that the crew could not have escaped from the *Eleutheria* after the collision without danger to their lives. Evidence was given on behalf of the plaintiffs to shew that the crew of the *Eleutheria* might have escaped in safety as alleged in the 4th article of the petition, but this was contradicted by the evidence of the defendants. Evidence was given on behalf of the plaintiffs to shew that Holland and Ellis, instead of keeping aft, improperly exposed themselves

(1) The judge ruled, that as the defendants were in the position of claimants, their witnesses should be examined before the plaintiff's witnesses.

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near the bows of the *Eleutheria* at the time she went aground; but this evidence was slight and was contradicted by evidence given on behalf of the defendants. It was established by the evidence that at the time of the collision the wind was fair for Plymouth, and that the gale did not increase in violence so as to cause any apparent danger to the *Eleutheria* until after the pilot cutter, which offered the last chance of escape to the crew, left her. It was proved that Brown, Newton, and Higgins received the injuries mentioned in their answer while endeavouring to clear the deck after the collision.

G. Bruce, for the plaintiffs. The injury done to the *Eleutheria* by the collision did not place the lives of Holland and Ellis in danger. The loss of their lives was occasioned by events of an exceptional character following after the collision. There was every prospect that the bark would have made Plymouth in safety. The gale did not increase in violence until hours after the collision. The collision may have been a causa sine quâ non, but it was not the causa causans of the loss. The law can look only at the results which in the common course of events would have followed in consequence of the collision. In the present case the loss of life arose ex novo casu: See the judgment of Erle, C.J., *Hoey* v. *Felton* (1); and the judgment of the same learned judge in *Ionides* v. *Universal Marine Association* (2); *Powell* v. *Gudgeon* (3); *Marsden* v. *City and County Assurance Co.* (4); *Glover* v. *London and South Western Ry.* (5); *Scholes* v. *North London Ry.* (6); *Burton* v. *Pinkerton.* (7) Holland and Ellis had opportunities of escaping from the *Eleutheria* in safety, and the loss of their lives is not owing to the collision but to their neglect to avail themselves of those opportunities. There is, moreover, evidence that the conduct of Holland and Ellis in refusing to go aft at the time the bark struck was such as to amount to contributory negligence. According to the principles ordinarily administered in this court contributory negligence does not afford an answer in a cause of damage. But in the case of claims

(1) 11 C. B. (N.S.) 142; 31 L. J. (C.P.) 105.
(2) 14 C. B. (N.S.) 259; 32 L. J. (C.P.) 170.
(3) 5 M. & S. 431.
(4) Law Rep. 1 C. P. 232.
(5) Law Rep. 3 Q. B. 25.
(6) 21 L. T. (N.S.) 835.
(7) Law Rep. 2 Ex. 340.

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for loss of life this Court can only proceed under Lord Campbell's Act (9 & 10 Vict. c. 93), and that Act only gives a right to compensation in cases where the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action at common law. This Court, therefore, as regards the claims for loss of life, must proceed upon common law principles. The claim on behalf of the infant en ventre cannot be maintained. There are, no doubt, many cases where the law will intervene to protect the rights of an unborn infant: Systema Juris Romani Hodie Usitati, Mackeldeii, tom. 1, sec. 2, c. 1, § 118. But the right to claim compensation on behalf of the infant en ventre can only arise in the present case by virtue of the provisions of Lord Campbell's Act. That Act gives a right of action in respect of pecuniary loss only, and a person not in existence at the time of the death cannot be said to have suffered pecuniary loss by reason of the death: *Blake* v. *Midland Ry. Co.* (1) Moreover, the Act defines the persons for whose benefit actions may be brought, and the word "child" in the Act must be taken to mean a child born alive.

W. G. F. Phillimore, for the defendants Noyes, Holland, Ellis, Brown, Newton, and Higgins. As regards the claim for loss of the lives of Holland and Ellis, the cases cited on the other side are nearly all cases decided on contracts of marine insurance, and do not govern the present case, for the rules which limit the damages in cases of contract do not apply in cases of tort: *Scott* v. *Shepherd* (2); *Vandenburgh* v. *Truax.* (3) The collision was the proximate cause of the loss of the lives of Holland and Ellis, for the train of events which followed upon the collision was the natural result of the collision. When a wrong is done which causes a ship to be left in a disabled state at the mercy of the winds and waves, the damage which results from the violence of the winds and waves is the natural consequence of the wrong: *Bailiffs of Romney Marsh* v. *Trinity House* (4); *Byrne* v. *Wilson.* (5) It was the duty of the crew to remain by the ship so long as there was any reasonable chance of saving her; and even if it were not they

(1) 18 Q. B. 93.
(2) 1 Sm. L. C. 6th ed. 417.
(3) 4 Denio R. (Amer.) 464, cited in 2 Sm. L. C. 6th ed. 499.
(4) Law Rep. 5 Ex. 204.
(5) 15 Ir. C. L. 332, 340.

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could not have escaped without danger, and where a wrongdoer places another in a position of alternative danger the wrong doer cannot complain that the other did not adopt the alternative which subsequent events may prove would have been the best: *Jones* v. *Boyce* (1); *Adams* v. *Lancashire and Yorkshire Ry. Co.* (2).

It is admitted that, as regards the claims for loss of life, this Court must be guided by the principles adopted by the courts of common law. But contributory negligence has not been proved.

It is clear that, according to the general rule of law, the rights of an infant en ventre sa mere will be protected: D. lib. 1, tit. v. 7. The English law follows the principles of the civil law in this respect: Daniel's Chancery Practice, 5th ed. vol. 2, p. 1477. The Court is not asked to award compensation in respect of any loss already sustained by the infant en ventre, but it is asked so to frame its decree as to allow the infant when born to make a claim in the ordinary way. Had the father of the child not been killed by the collision, he would, in the ordinary course of things, have contributed to the support of the child when born; and there is no good reason why the child, when born, should not be entitled to recover compensation for the pecuniary loss it must sustain.

Gibson, for the defendant Robert Alexander.

Bruce, in reply.

Cur adv. vult.

April 1. SIR ROBERT PHILLIMORE. This is a cause of limitation of liability, instituted on behalf of the owners of the *George and Richard* against the owners of the late vessel *Eleutheria* and her cargo, the master and survivors of the crew proceeding for their private effects; also against the widow of Philip Noyes, deceased; also against the child of which the widow is pregnant not yet born; also against the representatives of the persons of the name of Holland and Ellis, deceased; and also against three persons by name Brown, Newton, and Higgins, claimants on the ground of personal injury. The claim of the widow of Noyes as such has been admitted during the course of the suit; the claims of the other parties are contested.

The collision, which the owners of the *George and Richard* admit

(1) 1 Stark. 493. (2) Law Rep. 4 C. P. 739.

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to have occurred by reason of the improper navigation of that vessel, took place on the 15th of January in this year, about fourteen miles from the Lizard Light. It appears that the master of the *Eleutheria* got on board the *George and Richard* in order to ascertain her name, and went with her into Plymouth, and that he sent out a pilot-boat to the assistance of the *Eleutheria*, and fully expected to see the *Eleutheria* arrive shortly afterwards; and, being disappointed in this, sent out a steamboat, which, for some unexplained reason, after searching in vain for the *Eleutheria*, returned to Plymouth, and could not, on account of the weather, be induced to go out again. The pilot-boat went out and found a vessel attempting to tow the *Eleutheria;* but the attempt was vain, and the vessel went away; the pilot-boat then attempted to tow and failed; the boat was then sent away to seek for a tug; the pilot himself got on board the *Eleutheria*, with great difficulty and danger. As soon as the boat was gone, a heavy gale came on and continued until the *Eleutheria* was driven on shore at two o'clock next morning. The vessel went to pieces; five of the men were lost; the carpenter (Noyes) had his leg broken from the falling of a spar, and was afterwards drowned; Brown, Higgins, and Newton received slighter injuries, during their endeavours to clear the wreck, upon their legs and ankles.

The evidence satisfies me that if it had been right for the men to leave the ship, in the vessel which was attempting to tow her, they could not have got on board her without great danger to their lives. The chief officer of the *Eleutheria* said that before the ship broke in two on the rock, he called Ellis and Holland to come aft; but they did not come, or perhaps their lives might have been saved. The pilot said, that after his boat went and the gale came on, nothing could have been done to save the ship; that when he saw land alongside he sung out, "Every man look out for himself;" and there is some further evidence which would render it at least doubtful whether Holland and Ellis did not come aft. This is a short review of the facts, which I have thought it necessary to state previous to considering the arguments which have been addressed as to the laws applicable to them.

On behalf of the *George and Richard*, the following positions have been maintained: First, that the deaths of Holland and Ellis

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were not caused by the collision itself, but by subsequent events; secondly, that, at all events, there was negligence on their parts which contributed to their deaths; thirdly, that the personal injuries of Brown, Newton, and Higgins were not caused by the collision, but by events subsequent to it; fourthly, that the unborn child of the widow Noyes is not entitled to claim damages. The maxim of the common law, "Causa proxima non remota spectetur," was invoked, and a great many cases were cited, for the purpose of shewing that damages cannot be recovered by a plaintiff unless they be the proximate, and, as it is sometimes said, the natural, consequences and results of the defendant's wrong, and flow from it immediately and according to the common course of events. Many of the cases cited related to policies of insurance, and the decision depended on the construction of the instrument as to whether the injury in question arose from the expected perils. Cases of tort, however, as well as of contract were among those which the industry of counsel laid before me. I have endeavoured to examine them carefully. I may observe that the inclination of the Courts in cases of tort seems to be to render the wrongdoer liable for the injurious consequences of his illegal tortious act, although very remote. The well-known squib case (*Scott* v. *Shepherd* (1)) strongly confirms this observation. The earlier discussions on the subject seem to have been as to the technical form of the remedy, and the distinction between the actions of trespass and case, immediate injury founding the former, consequential the latter form of remedy.

In the case of *Byrne* v. *Wilson* (2), in which an action under Lord Campbell's Act was tried in 1862, in the Queen's Bench in Ireland, Lefroy, C.J., says: "The law is clear that any party is liable, not only for the immediate consequences of the negligence, but also for the resulting consequences of his negligence, but also for the resulting consequences of his acts, whether those acts are acts of violence, or of negligence in breach of a duty which imposed the necessity of care and caution upon him. Since the celebrated case of *Scott* v. *Shepherd* (1) the law has been perfectly settled, with the concurrence of four most eminent judges who at that time presided

(1) 2 W. Bl. 892; 1 Smith's L. C. 6th ed. 417.
(2) 15 Ir. L. Rep. 332.

in the English Court of King's Bench, De Grey, C.J., Blackstone, Gould, and Nares, JJ. . . . . In the present case it is admitted that the deceased lady was cast into the lock of the canal owing to the negligence of the defendant. But it is asserted that, when she had thus been put into a position in consequence of which (the lock-keeper having let in the water) she was suffocated, and thus came by her death, the defendant is not answerable, because the water was let into the lock by a person over whom he had no control. It was not the negligence of the defendant that was the immediate occasion of her death; but it was the negligence of the defendant that put her into a position by which she lost her life, as a consequential injury resulting from that negligence; and although that death was not caused immediately by the act of the defendant, nor was the immediate and instantaneous result of his negligence, yet it was the consequential result of the defendant's act, and enables her representative to maintain this action."

In the case of the *Bailiffs of Romney Marsh* v. *Trinity House* (1), decided in 1870, the defendant's vessel being driven upon a sea-wall became a wreck, and one of the questions for the Court was whether this injury to the wall was caused by the negligence of the defendants so as to make them liable, Kelly, C.B., said: "The defendants' vessel, by the negligence of the captain and crew, grounded upon a shoal or sandbank within three-quarters of a mile of the wall of the plaintiffs, the immediate effect of which was, that the vessel became unmanageable and beyond the control of the crew; and as at the time a high wind was blowing and the tide flowing towards the shore, the vessel was driven and carried with great violence against the wall, and so effected the injury in question. The rule of law is, that negligence, to render the defendants liable, must be the causa causans, or the proximate cause of the injury, and not merely a causa sine quâ non. I think that it was so in the present case. The immediate effect of the negligence was to put the vessel into such a condition that it must necessarily and inevitably be impelled in whatever direction the wind and tide were giving at the moment to the sea, and this was directly upon and towards the plaintiff's wall. The case, there-

(1) Law Rep. 5 Ex. 204.

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fore, appears to me to be the same as if the ship had been lying at anchor, with the tide flowing rapidly towards a rock, and the defendants had by some negligence broken the chain and set free the ship, in consequence of which it had at once and immediately been carried by the tide with great force and violence against the rock and had become a wreck. Would not the wreck of the ship have been caused by the negligence which broke the chain? I think it would, and that such a case and the case before the Court are the same, that the negligence of the crew, the servants of the defendants, was thus the immediate cause of the ship being driven against the wall of the plaintiffs, and that the plaintiffs are, therefore, entitled to recover."

The Judges of the Supreme Court in New York, have perhaps carried the law upon this point to its furthest limit in the judgment in *Vandenburgh* v. *Truax* (1), in which they relied on the case *Scott* v. *Shepherd*. (2) The marginal note of that case is correct, and is as follows:—

"One who does an illegal or mischievous act, which is likely to prove injurious to others, is answerable for the consequences which may directly and naturally result from his conduct, though he did not intend to do the particular injury which followed.

"Therefore, where the defendant, having had a quarrel with a boy in the street in a city, took up a pickaxe and followed him into the plaintiff's store, whither he fled, and in endeavouring to keep out of defendant's reach the boy ran against and knocked out the faucet from a cask of wine, by means of which a quantity of the wine ran out and was wasted; held that the defendant was liable to the plaintiff for damages."

There is perhaps some difficulty in ranging all the cases of consequential damages where a tort has been committed under one principle; but the general rule to be deduced is that the natural and proximate consequences of the tortious act are the proper subject for consideration. I do not mean to depart from this rule in my judgment in the present case. I conceive that I am acting in accordance with it when I pronounce as I do, that the deaths of

(1) 4 Denio R. (Amer.) 464.
(2) 2 W. Bl. 892; 1 Smith's L. C. 6th ed. 417.

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the men Holland and Ellis were the natural and proximate consequences of the collision.

It has been contended that the men whose lives were lost were guilty of a negligence which contributed to this catastrophe, and therefore that their representatives cannot recover damages under Lord Campbell's Act. It was not denied that if the facts shew this negligence the law is as has been stated.

The question is one of fact. What is the contributory negligence alleged? First, the alleged refusal of these men to go off when the vessel struck—upon this point there is a direct conflict of evidence as to the facts, and I am not disposed to disbelieve the evidence on behalf of the men; secondly, it is contended that they ought to have left the ship before; but I am of opinion that it was their duty to remain by the ship while there was any reasonable chance of preserving her, and if the circumstances would have justified them in leaving her that they could not have got on board the pilot-boat without great peril of their lives. The wrongdoer had no right to place them in a position of alternative danger and then to refuse compensation because they did not adopt that alternative which he expects would have been the means of saving their lives. This is not a case where there was inconvenience in one course and danger in another, but danger in both courses. The rule of law on this point appears to me clear. The distinction between inconvenience and "danger" in its bearing upon the liability of the defendant is well stated in the case of *Adams* v. *Lancashire & Yorkshire Ry. Co.* (1). Mr. Justice M. Smith there said: "I quite agree that, if the negligence of a railway company puts a passenger in a situation of alternative danger, that is to say, if he will be in danger by remaining still, and in danger if he attempts to escape, any injury that he may sustain in so doing is a consequence of the company's negligence; but if he is only suffering some inconvenience, and to avoid that he voluntarily runs into danger, and injury ensues, that cannot be said to be the result of the company's negligence." This is in accordance with the old case of *Jones* v. *Boyce* (2), in which an action was brought against a coach proprietor for so negligently conducting the coach that the plaintiff, an outside passenger, was obliged to jump off the coach,

(1) Law Rep. 4 C. P. 739, 742. (2) 1 Stark. 493.

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in consequence of which his leg was broken. Lord Ellenborough said: "To enable the plaintiff to sustain the action, it is not necessary that he should have been thrown off the coach; it is sufficient if he was placed, by the misconduct of the defendant, in such a situation as obliged him to adopt the alternative of a dangerous leap, or to remain at certain peril; if that position was occasioned by the default of the defendant, the action may be supported." Applying these rules of law to the case of these deceased men, I am of opinion that there was no negligence on their part which contributed to their deaths, and which can relieve the owners of the *George and Richard* of their responsibility.

With respect to the claim for personal injury of the men Brown, Newton, and Higgins, I am of opinion that it was not remotely, in any legal sense of the word, but proximately connected with the collision. The question of injury is of course to be ascertained at the reference, it will probably not be great.

I now approach the anxious and novel question of the right of the unborn child, of which the widow of Philip Noyes was pregnant at the time of the collision, to claim. There is no doubt that the law in many cases considers and protects the status of the unborn child. A bill may be filed in equity to restrain damages by a tenant for life where the infant, if born, would be the remainderman: so Mr. Justice Vaughan Williams observes on the subject of legacies to children. (1) "The leading principle is, that where a bequest is immediate to children in a class, children in existence at the death of the testator, and these alone, are entitled; amongst which children, en ventre sa mère, are to be considered." It has been argued, that the peculiar language of Lord Campbell's Act requires the actual existence of the claimant as a condition precedent to a right of action. I am not of this opinion. Although, as has been said, twenty-five years have passed since Lord Campbell's Act, and this particular question has not arisen for decision, it seems to have been considered in one case as within the purview of this statute.

In the case of *Blake* v. *Midland Ry. Co.* (2), Mr. Justice Cole-

(1) Williams on Executors, 6th ed. vol. 2, p. 1015.
(2) 18 Q. B. 93, 109.

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ridge said, "The title of this Act may be some guide to its meaning: 'An Act for Compensating the Families of Persons Killed;' not for solacing their wounded feelings. Reliance was placed upon the first section, which states in what cases the newly-given action may be maintained, although death has ensued; the argument being that the party injured, if he had recovered, would have been entitled to a solatium, and therefore so shall his representatives on his death. But it will be evident that this Act does not transfer this right of action to his representative, but gives to the representative a totally new right of action, on different principles. Sect. 2 enacts, that 'in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought.' The measure of damages is not the loss or suffering of the deceased, but the injury resulting from his death to his family. This language seems more appropriate to a loss of which some estimate may be made than to an indefinite sum independent of all pecuniary estimate, to soothe the feelings; and the division of the amount strongly leads to the same conclusion. And the amount so recovered 'shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct.' By what rules ought the jury to be guided in this apportionment? Are they to inquire into the degree of mental anguish which each member of the family has suffered from the bereavement? Then not only the child without filial piety, but a lunatic child, and a child of very tender years, and a posthumous child on the death of the father may have something for pecuniary loss but cannot come in pari passu with the other children, and must be cut off from the solatium. It seems to us that, if the legislature had intended to go the extreme length of giving not only compensation for pecuniary loss, but a solatium to all the relations enumerated in s. 5, a father and mother, a grandfather and grandmother, a stepfather and stepmother, a son and daughter, a grandson and granddaughter, a stepson and stepdaughter, language more clear and appropriate for this purpose would have been employed."

I am of opinion that the proctor for the unborn child has a

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right to claim in this suit; though until the child is born a reference on this subject cannot be made. (1)

Solicitor for plaintiffs: *Cooper.*

Proctors for defendant Alexander: *Rothery & Co.*

Proctors for the other defendants: *Clarkson, Son, & Greenwell.*

(1) The decree was drawn up in the following form:—

The Judge having maturely deliberated, pronounced in favour of the claim for damages on behalf of the defendants Elizabeth Noyes, Catherine S. Holland, Sarah R. Ellis, Joseph Brown, Thomas Newton, and James Higgins, and he further pronounced that the owners of the brig or vessel, *George and Richard*, are entitled to limited liability according to the provisions of the Merchant Shipping Act, 1854, and the Merchant Shipping Act Amendment Act, 1862, and that in respect of loss of life or personal injury, or of loss or damage to ships, boats, goods, merchandise, or other things caused by reason of the improper navigation of the said brig or vessel, *George and Richard*, on the occasion of the collision between the said vessel and the late bark or vessel *Eleutheria*, on the 15th day of January, 1871, the owners of the said brig or vessel, *George and Richard*, are answerable in damages to an amount not exceeding 4841*l.*, such sum being at the rate of 15*l.* for each ton of the registered tonnage of the said vessel, *George and Richard*, and he ordered that, upon payment of the costs incurred on behalf of the plaintiffs in causes No. 5612 and 5630, all proceedings in the said causes be stayed. The Judge further ordered that three advertisements should be inserted at an interval of not less than a week between each advertisement in each of the following papers: — viz., 'The Times,' 'Shipping and Mercantile Gazette,' and , and intimating to all persons having any claim in respect of the loss or damage caused as aforesaid, that if they do not come in and enter their claims in this cause on or before the 3rd of July next ensuing, they will be excluded from sharing in the aforesaid amount, the last of such advertisements to be inserted on or before the 16th day of June next; and he reserved leave to the infant en ventre of the said Elizabeth Noyes, if born alive within due time, to prefer its claim for damages before the registrar, assisted by merchants. And he referred all other claims brought in or to be brought in in this Court to the registrar, assisted by merchants, to report the amount thereof. The Judge also condemned the plaintiffs in the costs of this cause.

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April 25.

Broker's Commission—The County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 *Vict. c.* 51), *s.* 2—*Jurisdiction.*

A charterparty for the charter of the ship *N.*, entered into between the master of the ship and a firm of Liverpool merchants, contained a clause stating that 2½ per cent. commission was due on the execution of the charterparty to J. & K. J. & K., who were the brokers who had effected the charterparty, instituted a suit against the ship to recover this commission in the Court of Passage (Admiralty Jurisdiction). The Court dismissed the suit, on the ground that it had no jurisdiction to entertain the claim.

On appeal, the Court of Admiralty held, that the claim did not arise out of any agreement made in relation to the use or hire of a ship, or in relation to the carriage of goods in any ship, within the meaning of the 2nd section of the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), and affirmed the decision of the Court below.

THIS was an appeal from an order of the Court of Passage of the borough of Liverpool, in a cause instituted in that court on behalf of John Japp and Joseph Kirby, against the ship *Nuova Raffaelina* and the owners of the said ship. The præcipe to institute, was dated the 3rd of December, 1870, and stated that the cause was "a cause for a claim arising out of an agreement made in relation to the use or hire of a ship, namely, for the sum of 87*l.* 14*s.* 9*d.*, for commission on the effecting of charterparties of the ship hereinafter mentioned, on behalf of John Japp and Joseph Kirby, of Hargreaves Buildings, Chapel Street, in Liverpool, shipbrokers." On the 5th of December an appearance was entered on behalf of Francesco Durante, the master of the *Nuova Raffaelina*. On the 7th day of December, 1870, the defendant served the plaintiff with notice of a motion that the cause might be dismissed, on the ground that the claim of the plaintiffs was not a claim arising out of any agreement made in relation to the use or hire of any ship within the meaning of the County Courts Admiralty Jurisdiction Amendment Act, 1869, and that the said claim was not enforceable by proceedings within the Admiralty jurisdiction of the said Court of Passage.

This motion was heard on the 14th day of December, 1870, by the learned Assessor of the Court of Passage, and after hearing the

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arguments of counsel for the plaintiffs and defendant, the Court dismissed the cause with costs, on the ground that under the 32 and 33 Vict. c. 51, s. 2, the Court had no jurisdiction over the subject-matter of the claim in the cause.

Against this order the plaintiffs appealed. For the purposes of the appeal it was admitted that the claim was for commission on the effecting of a charterparty, of the material parts of which the following is a copy:—

Liverpool, 14th November, 1870.

It is this day mutually agreed between Captain Durante, of the good ship or vessel called the *Nuova Raffaelina*, of the measurement of 747 tons per register, or thereabouts, now in Princes Dock, whereof he is master, of the one part, and Messrs. Shute and Hamilton, of Liverpool, merchants and charterers, of the other part. That the said ship being tight, staunch, and strong, and every way fitted for the voyage, shall with all convenient speed proceed to New Orleans direct, or so near thereunto as she may safely get, and there, after discharging outward cargo for owner's benefit, load in the customary manner from the agents of the said charterers a full and complete cargo of cotton, which the said merchants bind themselves to ship, and being so loaded shall therewith proceed to Liverpool, or so near thereunto as she may safely get, and deliver the same on being paid freight as follows, namely, at the rate of, if discharged at Liverpool:—

Seventeen thirty seconds of a penny sterling per pound nett, weight delivered.

Payment of freight to become due and to be made as follows:—Cash for ordinary disbursments at port of loading, not exceeding 800*l.*, to be advanced to the master if required by the charterer's agent, at the current rate of exchange against the captain's draft at usance on the charterers or their agents in Europe, less cost of insurance and a commission of 2½ per cent., same to be deducted from the freight on settlement, and the remainder on the true delivery of the cargo, in cash less three months' interest at 5 per cent. per annum.

The ship to be addressed to the charterers' agents at port of loading, paying usual loading commission of 5 per cent., and at port of discharge 5 per cent. commission, and the captain to sign the usual letter of consignment, when required to do so, at port of loading by charterers or agents. The master to sign bills of lading at current rates of freight if required, without prejudice to this charterparty.

And for the true performance hereof each of the said parties doth hereby bind himself and themselves unto the other in the penal sum of amount of freight of good and lawful money of Great Britain, it being agreed that for the payment of all freight, dead freight, and demurrage, the said master or owners shall have an absolute lien and charge on the said cargo, 2½ per cent. commission is due on the execution of this charterparty to Japp and Kirby, Liverpool (ship lost or not lost), by whom the ship is to be reported at the Custom House on her arrival at Liverpool, or by their agents, if at any other port of discharge. Subject to owners' approval by telegram.

Signed by both in the presence of J. M. Kirby.

FRANCESCO DURANTE.
SHUTE & HAMILTON.

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April 18. *Charles Russell*, for the appellants. This is a claim arising out of an agreement made in relation to the use or hire of a ship within the meaning of the words in 32 & 33 Vict. c. 51, s. 2. The payment of commission is stipulated for by the charterparty, and the claim clearly arises out of the charterparty. The charterers, it is submitted, would clearly be entitled to sue as trustees for the broker: *Robertson* v. *Wait* (1); and if the claim is of such a nature that the Court would have jurisdiction over it in a suit brought by the charterers, it is strange if the Court has not jurisdiction to entertain the claim at the suit of the party directly interested.

G. Bruce, for the respondents. It cannot have been intended by the legislature to confer jurisdiction to enforce a claim for commission by proceedings in rem. A reasonable construction must be put upon the words of the statute: *The Dowse* (2). The claim in this case does not arise out of the charterparty. The plaintiffs are not parties to the charterparty, and their right to commission can only arise out of a distinct collateral agreement expressed or implied.

Russell, in reply.

Cur. adv. vult.

April 25. SIR ROBERT PHILLIMORE. This is an appeal from the Court of Passage at Liverpool, under 32 & 33 Vict. c. 51. The learned judge of that court, without assigning any reasons, decided that he had no jurisdiction to entertain the case. I regret that I have not the benefit of knowing the grounds upon which he proceeded. The point to be decided is, whether the present plaintiffs, who are shipbrokers, are entitled to sue in rem in the Admiralty Court for their commission in the following circumstances:—

On the 14th of November, 1870, a charterparty was entered into between the captain of the *Nuova Raffaelina* and certain Liverpool merchants and charterers. In the penultimate clause of that charterparty it is stated that "$2\frac{1}{2}$ per cent. commission is due on the execution of this charterparty to Japp & Kirby," the present plaintiffs and appellants.

(1) 8 Ex. 299; 22 L. J. (Ex.) 209. (2) Ante, p. 135.

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It is contended that Japp & Kirby may sue for this commission in the Court of Passage by reason of the following words in 32 & 33 Vict. c. 51, s. 2: "Any county court" (with Admiralty jurisdiction) may try a cause "as to any claim arising out of any agreement made in relation to the use or hire of any ship."

I have not now to consider whether, if the charterers were suing for the commission in question, they would not be entitled to do so. It is very possible that under the authority of *Robertson* v. *Wait* (1) they might have a locus standi as trustees for the broker for this purpose. I am inclined to think, that if they were so suing on the charterparty, the claim might be considered as arising out of the use or hire of the ship. But the appellants, who are brokers, cannot sue upon this instrument made between other parties, whatever use they might make of it as evidence in another action upon an implied contract for their services.

As the jurisdiction of the Court of Passage must in this case be founded upon a claim growing out of the charterparty, a claim which I have said the appellants cannot maintain, I must, for the reasons which I have stated, and those only, dismiss the appeal with costs.

Solicitors for appellants: *Makinson & Carpenter.*
Solicitors for respondents: *Chester & Urquhart.*

(1) 8 Ex. 299; 22 L. J. (Ex.) 209.

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Aug. 2.

Salvage—Passengers' Wearing Apparel—Life Salvage—Services rendered wholly or in part in British Waters—The Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *s.* 458—*The Admiralty Court Act*, 1861 (24 *Vict. c.* 10) *s.* 9—*The Merchant Shipping Act*, 1862 (25 & 26 *Vict. c.* 63) *s.* 59.

Services were rendered, by means of which a vessel and the goods on board her were saved from total loss, and the lives of a number of passengers on board her were saved. Suits were instituted on behalf of the persons who rendered the services, against the vessel and her cargo, to recover salvage reward :—

Held, that the wearing apparel of the passengers, and other things belonging to them, ejusdem generis, on board the vessel, were privileged from arrest.

A Dutch vessel took fire on the high seas, and some of her crew and some passengers who were on board her escaped in boats, and were picked up by a French schooner. The schooner afterwards fell in with a British steam-vessel, and the persons who had been picked up by the schooner were, at their own request, put on board the steam-vessel, and were carried by her into an English port. The schooner was not within British waters during any portion of the time when the services were rendered :—

Held, that the schooner had not rendered services such as to entitle her to claim salvage reward by virtue of the provisions of the Merchant Shipping Act, 1854, or the Admiralty Court Act, 1861.

The *Willem III.*, a Dutch steam-vessel of 3000 tons burthen, having on board more than 200 passengers, took fire on the evening of the 19th of May, 1871, about eight miles to the southward and eastward of the Owers light-vessel. The *Mary*, a pilot cutter belonging to Portsmouth, of 35 tons measurement, the first vessel to arrive near the *Willem III.*, picked up 114 persons, who had escaped in boats from the burning vessel, and the next day landed them at Portsmouth. Boats from the *Willem III.* brought other persons alongside the *Mary;* but the master of the *Mary*, fearing lest the *Mary* should become overladen, directed two of these boats to make for a small schooner at some distance, which afterwards proved to be a French vessel called the *Flora*. The two boats made for the *Flora*, and the persons in them, and other persons who had escaped in other boats from the *Willem III.*, were picked up by her. Shortly afterwards, the *Scorpio* steam-vessel of 661 tons register, bound on a voyage from Sunderland to Charente, saw the flames of the *Willem III.* and steamed towards her. The *Scorpio* picked up a number of the crew and passengers of the

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Willem III. from boats, and took on board the persons who had been picked up by the *Flora* and carried them to Spithead, where they were landed in safety. The *Cambria*, a paddle-wheel steam-tug, arrived before the *Scorpio* left, and rendered assistance by towing the burning vessel and grounding her outside Spithead on Hamilton Bank, and there pumping water into her main hold. The fire was ultimately extinguished, and the *Willem III.* and a portion of the cargo and other effects on board her were saved from total loss. Luggage and personal effects belonging to the passengers on board the *Willem III.*, and coin to the value of about 30*l.* also belonging to them, were amongst the goods saved. A great part of the luggage and personal effects saved was in a damaged condition.

A salvage suit (No. 5771) was instituted against the *Willem III.* and cargo and freight, on behalf of the *Scorpio*. Another suit (No. 5774) was instituted on behalf of the *Cambria*. These suits were consolidated, and one petition was filed in the consolidated suit. Two other suits (Nos. 5773 and 5775) were instituted, one on behalf of the *Mary* and one on behalf of a pilot cutter called the *Alarm*, which claimed to have rendered salvage services. These suits were consolidated, and one petition was filed in the consolidated suit. In pursuance of a warrant issued in one of these suits, the *Willem III.* and the cargo and effects on board of her were arrested by the marshal of the court.

June 27, 1871. *W. G. F. Phillimore* moved the Court to direct that the luggage and personal effects of the passengers should be released from arrest. The luggage and personal effects of passengers are not liable to contribute to salvage. The wearing apparel of the master and seamen has always been exempted: Beawes' Lex Mercatoria, vol. i. p. 242, 6th ed. by Chitty (1813); Marvin on Salvage, p. 133; *The Emblem.* (1) The same principle applies to the wearing apparel of passengers: *The Rising Sun* (2); *The Amethyst.* (3) It is settled law that passengers' effects do not contribute to general average: Abbot on Shipping, 11th ed. p. 549; Émérigon, Traité des Assurances, c. xii. s. 42, Boulay-Paty's ed.

(1) Daveis' (Amer.) Rep. 61. (2) Ware's (Amer.) Rep. 378.
(3) Daveis' (Amer.) Rep. 20.

(1827); vol. i. p. 626; and this affords by analogy a strong argument against holding that such things are liable to salvage.

The Admiralty Advocate (*Dr. Deane, Q.C.*), and *E. C. Clarkson*, on behalf of the *Mary* and *Alarm*, opposed the motion. The broad rule is, that the salvor has a lien upon whatever is saved. *Hartford* v. *Jones* (1); the report in Salkeld shews that part of the property saved consisted of twenty carpenters' small tools. Personal effects may include things of great value; and if goods belonging to passengers are to be exempt from all liability to contribute to salvage, salvors may, in the case of passenger ships, be deprived of their reward for saving the most valuable part of the goods in peril. Passengers may have amongst their personal effects wares and merchandise; for instance, it is quite likely that an emigrant might take out his entire capital with him. Why should merchandise be exempt simply because it belongs to a passenger, and how is it possible in practice to draw a line between such personal effects as may be treated as merchandise and other personal effects? The lives of the passengers were in danger, and the cargo of the ship has to bear its proportion in contributing to reward the services rendered in saving life: *The Fusilier*. (2) It would be unreasonable to hold, that the goods of the passengers, the very persons saved, should be freed from a liability which attaches to the cargo. The practice which has sprung up not to exact salvage contribution in respect of the wearing apparel of seamen is one of many instances of the indulgence granted by the maritime law to seamen. There is no reason why the same indulgence should be granted to passengers. No analogy, applicable to the present case, can be drawn from the law of general average. The cases cited on the other side do not apply: *The King* v. *Property Derelict*. (3)

Phillimore, in reply. The Court is asked to direct that the luggage and personal effects only of the passengers should be released. It is admitted the wares or merchandise belonging to the passengers are liable to contribute to salvage, but there is a clear distinction between personal luggage and merchandise. *Macrow* v. *The Great Western Ry. Co.* (4) is one of a class of cases

(1) 1 Ld. Raym. 393; 2 Salk. 654.
(2) Br. & L. 341.
(3) 1 Hagg. Adm. 383.
(4) Law Rep. 6 Q. B. 612.

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in which the distinction between personal luggage and other effects has been much discussed.

[SIR ROBERT PHILLIMORE. How is it possible for the Court on this motion to decide what portion of the effects in question fall within the category of personal luggage ?]

If the Court directs that the personal luggage of the passengers shall be released from arrest, the parties themselves will adopt some means of determining the particular articles to be released.

SIR ROBERT PHILLIMORE. I am of opinion that the wearing apparel of passengers, and other effects carried by them for their daily personal use, may properly be considered to be privileged. Such articles as fall within this category should, I think, be delivered up to the passengers. Lest any difficulty arise in determining the character of any of the goods in question, the parties, if they think fit, may agree to appoint some person to act as arbitrator, who can inspect the articles and determine their character, or, if necessary, the matter may be again brought before the Court. (1)

The consolidated suits (Nos. 5771 and 5774, and Nos. 5773 and 5775) came on for hearing together on the 31st of July, 1871.

Butt, Q.C., and *E. C. Clarkson*, were counsel for the *Scorpio* and the *Cambria*.

The *Admiralty Advocate*, and *E. C. Clarkson*, were counsel for the *Mary* and *Alarm*.

Sir John Karslake, Q.C., and *W. G. F. Phillimore*, were counsel for the *Willem III.*

The suit first instituted was the suit instituted on behalf of the *Scorpio*, and *Butt* claimed the right to begin. He cited *The Morocco* (2). The Court, however, held that in salvage cases, where several suits have been instituted, there is no inflexible

(1) The order was drawn in the following form:—Nos. 5771 and 5774. Consolidated Causes. June 27th. The judge having heard counsel on both sides, ordered that the defendants be at liberty, under the inspection of some person to be agreed upon between the parties to this cause, to deliver to the passengers on board the vessel *Willem III.* at the time of the services in question in this cause being rendered, the wearing apparel and other goods, ejusdem generis, belonging to them; and he made no order as to the costs of this motion.

(2) 1 Aspinall's Maritime Law Cases, 46.

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rule to entitle the plaintiffs in the suit first instituted to begin, and ruled that in the present case convenience required that the case on behalf of the *Mary*, the vessel which was the first to render services to the *Willem III.*, should be first heard.

The Court, having heard the causes, awarded salvage remuneration to the claimants in suits Nos. 5771, 5774, and 5773, and awarded a sum of 20*l.* to a pilot on board the *Alarm*, one of the plaintiffs in suit No. 5775.

On the 2nd of August the Court was moved to reject a petition which had been filed in another salvage suit, instituted on behalf of the *Flora* against the *Willem III.*

The material allegations in the petition were in substance as follows:—

1. The *Flora* is a French merchant schooner, belonging to the port of Nantes, in France. She was, at the time of the occurrences hereinafter mentioned, manned by a crew of nine hands, all told, all of whom were foreigners, and she was in the prosecution of a voyage from Nantes to Stockholm.

2. In the course of her voyage, and shortly after 9 P.M. on the evening of the 20th of May, 1871, the *Flora* was off St. Katherine's Light, which was distant about eight miles.

3. Under these circumstances the master of the *Flora* observed signal rockets and coloured lights proceeding from some vessel apparently five or six miles to the southward, whereupon he immediately proceeded in their direction. Shortly afterwards a flame of fire shot up from about the same spot, and the captain of the *Flora* at once ordered all his crew on deck, and made all possible sail towards the burning object, which proved to be the *Willem III.*, the vessel proceeded against in this cause.

4. On nearing the *Willem III.*, cries and screams were heard by those on board the *Flora;* it was soon discovered that they came from certain persons who were on board four boats, having escaped therein from the *Willem III.* The *Flora* at once bore down to the boats, and those on board the *Flora* were asked by an officer belonging to the crew of the *Willem III.* whether they could take the people in the boats on board. Those on board the *Flora* at once consented to do so, and about 100 persons, being

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passengers and crew from the burning vessel, came on board the *Flora*. The boats from which the persons were taken were made fast alongside of the *Flora*. The *Flora* then lay by the burning vessel until between three and four on the morning of the 20th of May, in order to see if any further assistance could be rendered.

5. Everything in the power of those who were on board the *Flora* was done to make the persons who had been taken on board as comfortable as possible; dry clothes were lent to some of them, and everything on board the *Flora* was placed at their disposal.

6. The persons who came on board the *Flora* from the boats proved to be foreigners, and the majority of them were natives of Holland, and were anxious to return to their native country, whereupon the captain of the *Flora* offered to land them either at Dover or Calais, the wind being fair for either of those places; but on the arrival of the *Scorpio*, a screw-steamer, they were taken on board of her, and the boats of the *Willem III.* were made fast to the *Scorpio*.

7. The *Scorpio* conveyed the persons who were taken off from the *Flora* to Spithead, where they were taken off from the *Scorpio* by another steamer. The boats of the *Willem III.* which had been taken from the *Flora* were also towed by the *Scorpio* to Spithead, and brought into Plymouth by a steam-tug. The *Flora* could have easily and safely landed all the persons who had come on board of her from the *Willem III.* at Spithead, Dover, Calais, or any other adjacent port on the English or French coast.

9. The *Flora* was not, during any portion of the time when the persons from the *Willem III.* were on board of her, within three miles of the shore of England, or in British waters.

W. G. F. Phillimore, in support of the motion to reject the petition. The petition sets forth no facts to found a claim to salvage reward, except in respect of the saving of life. By the General Maritime Law salvage reward cannot be recovered for the preservation of life alone; and it is only by virtue of the provisions of the Merchant Shipping Act, 1854, s. 458; the Admiralty Court Act, 1861, s. 9; the Merchant Shipping Act, 1862, s. 59, that the saving of the lives of persons constitutes a direct claim to salvage. But the present case does not fall within the enactments in question, because the service was not performed wholly or in part in

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British waters; and no order in council such as contemplated by the 59th section of the Merchant Shipping Act, 1862, has been made applicable to service rendered in saving life from Dutch vessels: *The Johannes* (1); *Cope* v *Doherty*. (2)

R. E. Webster, in support of the petition. It is admitted that the question turns upon the meaning of the 9th section of the Admiralty Court Act, 1861. That section extends the provisions of the Merchant Shipping Act, 1854, in regard to salvage of life, to the salvage of life "from any foreign ship or boat, where the services have been rendered either wholly or in part in British waters." In the present case the services were rendered in part in British waters. The *Flora* herself was not within British waters, but she performed an essential part of a service which was completed by the *Scorpio* in British waters. The *Flora* was, as it were, the bridge by which the persons who came on board of her escaped. The *Flora* contributed to a salvage service which was afterwards completed by others: *The Atlas* (3); *The Samuel* (4); *The E. U.* (5) The first step towards the service and the last act completing the service constitute but different parts of one service; and if any part of the service is performed within British waters, all who have taken part in the service are entitled to the benefit of the provisions of the 9th section of the Admiralty Court Act, 1861. This is a case in which a liberal construction should be put upon the enactment, because it was for the advantage of the passengers to be put on board the *Scorpio*, in order that they might be speedily landed. Had the *Flora* chosen to land the passengers herself at Spithead, she would undoubtedly have been entitled to salvage reward, and it will be a great hardship if it should be decided that by her attention to the wishes of the persons she saved, she has deprived herself of a reward she would otherwise have been entitled to.

Phillimore, in reply.

SIR ROBERT PHILLIMORE. This case, which involves a question of some difficulty, has been very well argued.

(1) Lush, 182.
(2) 4 K. & J. 367.
(3) Lush. 518.
(4) 15 Jur. 407.
(5) Spinks, 63.

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I must, though reluctantly, take it to be established law that, according to the jus gentium, the saving of the lives of persons does not of itself confer a right to salvage reward; and the case of *The Johannes* (1) establishes that the provisions of the Merchant Shipping Act, 1854, do not give this Court jurisdiction over salvage of life only, from a foreign ship, performed on the high seas, at a distance of more than three miles from the shore of the United Kingdom. The 9th section of the Admiralty Court Act, 1861, was intended, no doubt, to extend the provisions of the Merchant Shipping Act, 1854. It is admitted that no treaty exists to enable the plaintiffs to invoke the aid of the 59th section of the Merchant Shipping Act, 1862, so that the question is reduced to this: do the circumstances shew that the services have been rendered, either wholly or in part, in British waters, within the meaning of the 9th section of the Admiralty Court Act, 1861. Notwithstanding Mr. Webster's able argument, I think that the 9th section cannot be intended to apply to a case such as the present. I think it applies only to cases where the services, in respect of which remuneration is claimed, have been rendered wholly or in part in British waters. No part of the services rendered by the *Flora* were rendered in British waters, and I think the circumstance that other services were afterwards performed by other persons, in British waters, cannot avail to bring the claim of the *Flora* within the provisions of the Act of Parliament.

Having regard to the fact that the statutes to which I have referred have introduced a rule different from that recognized by the existing law of nations, I do not feel at liberty to extend, in any degree, the natural construction of the words of the legislature. I dismiss the petition, but without costs.

Solicitors for the *Scorpio* and *Cambria*: *Cattarns, Jehu & Cattarns.*

Solicitors for the *Mary* and *Alarm*: *Lowless, Nelson & Jones.*

Solicitors for the *Flora*: *Ingledew, Ince & Greening.*

Proctors for the *Willem III.*: *Pritchard & Sons.*

(1) Lush, 182.

THE FREEDOM.

1871
Nov. 10.

Practice—Cause instituted in a Sum insufficient to cover Costs—Ship released on Bail ordered to be re-arrested—Admiralty Court Act, 1861 (24 *Vict. c.* 10), *ss.* 15, 22.

A cause of damage to cargo was instituted against a foreign ship in the sum of 500*l.* The owners of the ship appeared as defendants in the cause, bail was given in the sum of 500*l.*, and the ship was released. The cause proceeded to hearing, and the Court condemned the defendants in damages and costs. The damages were assessed at 452*l.* 2*s.* 8*d.*, and the costs of the plaintiffs in the suit were taxed at 432*l.* 10*s.* 3*d.* The defendants paid to the plaintiffs 500*l.*, and denied their liability to pay any further sum. Afterwards, the ship being within the jurisdiction, the Court, upon the application of the plaintiffs, ordered a writ to issue directing the marshal to arrest the ship for the payment of the balance of costs due to the plaintiffs.

Nov. 3. *Cohen*, on behalf of the plaintiffs in the cause, moved for leave to issue one or more writs of fieri facias in such form as the Court might see fit.

It appeared that the ship *Freedom* was within the jurisdiction of the Court: the judge directed the plaintiffs to bring in a petition setting forth the grounds of their application, the solicitor for the defendants having given an undertaking that the ship should not in the meantime be removed out of the jurisdiction.

A petition was subsequently filed, which was in substance as follows:—

The solicitors for the plaintiffs in a cause instituted by the plaintiffs, Messrs. Simmonds, Hunt, & Co., merchants of London, under the 6th section of the Admiralty Court Act, 1861, against the *Freedom*, an American ship, of which the defendants are the owners, domiciled in America, say as follows:—

1. The plaintiffs were the indorsees of bills of lading of parcels of oil-cake, shipped on board the said vessel, and as such indorsees they instituted this cause in order to recover damages on account of the oil-cake not having been delivered to them in good order and condition, nor according to the terms of the bills of lading.

2. At the time of the institution of the cause it was not possible for the plaintiffs to estimate accurately the amount of damage sustained by the oil-cake and its consequent depreciation, but thinking that the amount of damage would probably be found to be between 200*l.* and 300*l.*, the suit was instituted in the sum of 500*l.*, and on bail being put in in that amount, the ship was released from arrest.

3. At the time of the institution of the cause, the plaintiffs, then solicitors, thought, and reasonably thought, that the damage and costs would not exceed 500*l.*, and it was therefore not considered proper to institute the suit in a larger sum.

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4. Contrary to the reasonable expectation of the plaintiffs, the defendants, the owners of the ship, refused to admit that the oil-cake was shipped in good order and condition, and it therefore became necessary to issue a commission for the examination of witnesses at New York.

5. After the return of the commission, the cause came on for hearing before this honourable court, and the hearing lasted five days, when the right honourable the learned judge of this court condemned the defendants in damages and costs, referring the question as to amount of damage to the decision of the registrar and merchants.

6. From the said judgment the defendants appealed to the Judicial Committee of the Privy Council, and their appeal was dismissed with costs.

7. After the dismissal of the said appeal, the plaintiffs' claim was carried on by them before the registrar and merchants, and after investigating the claim and hearing the parties in reference thereto, the learned registrar made his award, and thereby found that the damages which the plaintiffs were entitled to recover in the said suit amounted to 452*l.* 2*s.* 8*d.*

8. The costs of the plaintiffs in the suit were afterwards taxed at the sum of 432*l.* 10*s.* 3*d.*

9. The defendants have paid to the plaintiffs the sum of 500*l.*, which is less than the amount of damages so found by the learned registrar, and the costs by the sum of 384*l.* 12*s.* 11*d.*

Wherefore the plaintiffs, by their said solicitors, pray the right honourable the judge to allow the plaintiffs to increase the amount in which the suit was instituted, and to direct that a writ of fi. fa., or other process of this court, do issue to enable the plaintiffs to obtain execution and satisfaction of the said judgment for damages and costs.

An affidavit was filed by the plaintiffs in support of the allegations in the petition.

The solicitor for the defendants filed an answer to the plaintiffs' petition. It was, in substance, as follows:—

1. The solicitor for the defendants admits the truth of the contents of the 1st, 5th, 6th, 7th, 8th, and 9th articles of the said petition.

2. As to the 2nd and 3rd articles of the said petition, he says that the plaintiffs and their solicitors respectively, could, by the exercise of reasonable care at the time of the institution of this suit, have formed an approximately accurate estimate of the amount of damage sustained by the oil-cake, and its consequent depreciation, and could and ought to have foreseen that the damages and costs would much exceed the sum of 500*l.*

3. As to the 4th article of the said petition, he says that the defendants did not lead the plaintiffs to expect, and the plaintiffs had not any reason to expect, that the defendants would admit that the oil-cake was shipped in good condition.

5. And he submits that this honourable court has not power to grant the prayer of the said petition, and that if this honourable court has such power, then that under the circumstances of this case, such prayer ought not to be granted.

And the said solicitor prays the right honourable the judge to reject the prayer of the said petition, and to condemn the plaintiffs in the costs of these proceedings.

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Nov. 7. *Cohen*, in support of the petition. By the prayer of the petition the Court is asked to increase the amount in which the suit was instituted; but that portion of the prayer is abandoned as unnecessary. The plaintiffs have already received the damages awarded in the suit, and they now only seek the aid of the process of the Court to enable them to recover the costs of the proceedings in this court. A decree of the Court has been pronounced whereby these costs have been made payable to the plaintiffs, and the Court has power to "issue any new writ or other process necessary" for their recovery: Admiralty Court Act, 1861 (24 Vict. c. 10, ss. 15, 22). The claim for costs is ancillary to the claim for damages, and the jurisdiction of the Court as regards costs is not in any way limited by the amount of the claim for damages: *Nostra Senora del Carmine* (1); *The Temiscouata* (2); *The Kate* (3); *The Volant* (4); *Straker* v. *Hartland*. (5)

E. C. Clarkson (*Butt, Q.C.*, with him), for the defendants. It has always been the practice in this court to institute a cause in a sum sufficient to cover the claim and costs. The plaintiffs ought to have instituted the suit in a sufficient sum to cover the costs, and the Court will not allow the defendants to be harassed by ordering the ship to be arrested a second time. The practical effect of the application is to increase the amount in which the suit is instituted; this the Court cannot do after judgment has been pronounced: *Tebbs* v. *Barron* (6); *Cannan* v. *Reynolds*. (7)

Cohen, in reply.

Cur. adv. vult.

Nov. 10. SIR ROBERT PHILLIMORE. In this case the plaintiffs, who were English subjects, instituted a suit against the American ship *Freedom*, of which the defendants were owners domiciled in America, for damage to cargo. I gave judgment in favour of the plaintiffs, and this judgment was affirmed by the Court of Appeal. The usual reference was made to the registrar, who reported that there was due to the plaintiffs 452*l.* 2*s.* 8*d.* with interest, and the

(1) 1 Eccl. & Adm. 303.
(2) 2 Eccl. & Adm. 208.
(3) Br. & Lush. 218; 33 L. J. (P. M. & A.) 122.
(4) Br. & Lush. 321.
(5) 2 H. & M. 570; 34 L. J. (Ch.) 122.
(6) 4 M. & G. 844.
(7) 5 E. & B. 301; 26 L. J. (Q.B.) 62.

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costs were taxed at the sum of 432*l.* 10*s.* 3*d.* The suit had been instituted in the amount of 500*l.*, and bail had been taken for that amount, and the ship released. The defendants have now paid to the plaintiffs the sum of 500*l.*, leaving the sum of 384*l.* 12*s.* 11*d.* due for costs still unpaid. It appears that the ship is now within the jurisdiction of the Court.

The plaintiffs pray the Court, for Mr. Cohen confined himself to this part of the prayer, to issue such process against the ship as may enable the plaintiffs to obtain execution and satisfaction of the judgment for damages and costs. The defendants contend that the application is too late; that before judgment the Court might have increased the amount in which the suit was instituted on proper application being made to it; but that it has no power to do so after judgment has been given; and that the ship having been released on bail, given for the full amount in which the suit was instituted, cannot be re-arrested. Cases were cited by the defendants from the courts of common law; the one principally relied on was *Cannan* v. *Reynolds* (1) for the proposition that, where a mistake has been made in the amount claimed and recovered, the judgment may be set aside at the instance of the plaintiff upon payment of all costs incurred after declaration, and a new action entered; and it was contended that this was the only mode of redress to which the plaintiffs could have recourse. It was not denied that these cases, whatever their authority may be for the practice of this Court, related only to an increase of the amount of damage for which the action was laid, and that at common law the claim of a plaintiff in respect to the costs of an action is not in any way limited by the sum claimed in the declaration. But it was urged that it was according to the invariable practice of this Court that the præcipe for the institution of the suit should lay the amount at a sum which would cover costs as well as damages, and therefore I find a difficulty in following the argument that the common law cases cited were applicable.

I am clear that this contention of the defendants is founded upon an erroneous view of the practice of the Court. It did not require the authority of *The Temiscouata* (2) to prove that this Court can always issue a monition in personam for the payment of

(1) 5 E. & B. 301; 26 L. J. (Q. B.) 62. (2) 2 Eccl. & Adm. 208.

costs which have exceeded the amount in which the suit was instituted; moreover, if the vessel had not been bailed and were still under arrest, there can be no doubt that she would not be released without payment of costs, and the fact of bail having been given in no way affects the liability of the owner of the ship for costs as well as damages, and I think that even under the old law, if necessary, the Court would have ordered the re-arrest of the ship for the payment of costs. I say nothing about the subject of damages. The fact that generally the amount in which the suit is instituted is laid to cover probable costs and damages is simply a matter of convenience; and the Court has always discouraged the institution of a suit for an excessive amount.

In this case the defendants are foreigners domiciled abroad, and no monition in personam can be enforced against them; though if they had succeeded in the suit they could have obtained a monition in personam against the plaintiffs. It is therefore manifestly in furtherance of justice that the plaintiffs should have the remedy which they pray for.

Such a remedy might, I think, have been furnished by the old law and practice of the Court; but however this may be, I am satisfied that the 15th section of the Admiralty Court Act, 1861, enables the Court to cause execution of the sentence by the seizure of the goods, which in this case are the ship, of the defendants; and under the 22nd section I have the power to frame a writ for that purpose; and I shall execute that power by directing, under a proper instrument, the marshal to seize the ship of the defendants for the payment of the balance of costs due to the plaintiffs, in which will be included the costs of this application. (1)

Solicitors for plaintiffs: *Thomas & Hollams.*

Solicitor for defendants: *Cooper.*

(1) *Clarkson* asked leave to appeal, which the judge granted on proper bail being given to include the probable costs of the appeal.

The writ was drawn up in the registry. It was directed to the marshal; and after reciting the circumstances of the case, it proceeded as follows: "We do therefore hereby command you, justice so requiring, to arrest the said vessel *Freedom*, her tackle, apparel, and furniture, and to keep the same under safe arrest until the defendants shall have paid what may be due from them to the plaintiffs in this cause, or until you shall receive further orders from us." The defendants paid the money before the writ could be issued from the registry, and the writ was not delivered to the marshal.

1872
Jan. 29.

THE JOHN FENWICK.

Sailing Rules—Regulations for preventing Collisions at Sea—Rule 20.

When a vessel casting off from moorings in a navigable river places herself at night partly athwart the fairway, so that her regulation lights cannot be seen by vessels astern of her coming up the river, she is bound to make use of some conspicuous signal to warn them of her position.

THIS was a cause of damage instituted by the owners of the screw steamship *Granton* against the screw steamship *John Fenwick*. A cross cause was instituted by the owners of the *John Fenwick* against the *Granton*. The cause and the cross cause now came on to be heard together. The following are the material facts:—On the 18th day of October, the *Granton*, a vessel of 637 tons register, and 245 feet long, arrived with cargo at Brown's Wharf, Blackwall, at about 5 P.M. There she discharged a portion of her cargo, and afterwards made fast alongside a coal hulk moored in Blackwall Reach, on the north side of mid-channel above Brown's Wharf.

A little before 5 A.M. the next morning, when it was dark, and the tide was about the last quarter flood, the *Granton* cast off from the hulk, in order to proceed to the upper pool to discharge there the rest of her cargo. When the *Granton* cast off she extinguished her riding light, and exhibited the proper regulation lights for a steamship under weigh. In consequence of the length of the *Granton*, it was impossible to steam ahead at once, and the stern fastenings were therefore cast off, and the tide acting on her stern, sheered it off from the hulk. She then cast off the head ropes and steamed astern. When steaming astern, and about mid-channel, and partly athwart the river, a sailing barge was observed driving up with the tide and crossing her stern, and in consequence, the *Granton's* engines were first stopped and then moved easy ahead, to keep the *Granton* stationary. Vessels lying at anchor on the north shore rendered it impossible for the *Granton* to go ahead. Whilst the *Granton* was in this position, with her head pointing a little up the river, the *John Fenwick* was proceeding up the river, and rounded Blackwall Point. Those on

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board the *Granton* saw the mast-head and red lights of the *John Fenwick* about three quarters of a mile off. The *Granton* was in such a position that her regulation lights could not be seen by the *John Fenwick*, and the master of the *Granton* ordered a lantern to be put over her stern as a signal to the *John Fenwick*. One of the common service lanterns of the ship, such as were ordinarily used for lighting the deck and hatchways when cargo was being taken in or discharged at night, happened at this time to be hanging up and alight under the bridge. This lantern was hung over the rail of the ship; but whether it was hung over the stern or over the starboard quarter was not clear. This lantern was not seen by those on board the *John Fenwick* till after the collision. The *John Fenwick* proceeded up the river until she came within a short distance of the *Granton*, when she made out the hull of the *Granton* across the river. The engines of the *John Fenwick* were then stopped and reversed, but too late to avoid the *Granton*, and the starboard bow of the *John Fenwick* came into collision with the starboard quarter of the *Granton*. It was admitted by the witnesses called on behalf of the *Granton*, that sufficient time elapsed between the lights of the *John Fenwick* first becoming visible, and her near approach, for those on board the *Granton* to have got out the riding lamp and exhibited it as a signal to the *John Fenwick*.

Butt, Q.C., and *R. E. Webster*, for the *Granton*.
Milward, Q.C., and *G. Bruce* for the *John Fenwick*.

SIR ROBERT PHILLIMORE. It is quite clear that the *Granton* when she cast off from the hulk and placed herself athwart the fairway of the river, in the early morning when it was dark, incurred great risk. When executing such a manœuvre, at such a time, she ought to have taken every possible precaution to warn approaching vessels of her position. What did she do? According to her own account, when she saw the *John Fenwick* approaching, all that she did was to exhibit an ordinary service lantern over her stern, or as some of the witnesses say, over her quarter. I am of opinion that this service lantern was not sufficient to give effectual warning to the *John Fenwick*. Those on board the *Granton* should

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have used as a warning signal the very best light they had on board. It is true there is no special regulation defining the signals to be used in such a case as the present; but the provisions of the 20th article of the Regulations for Preventing Collisions at Sea, state that nothing in those rules shall exonerate any ship from the consequences of any neglect to carry lights or signals, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

There is no evidence of any negligence on the part of the *John Fenwick*. I must, therefore, pronounce the *Granton* alone to blame.

Solicitors for the *Granton*: *Cattarns, Jehu, & Cattarns.*

Solicitors for the *John Fenwick*: *Hillyer, Fenwick & Stibbard.*

Jan. 23.

THE EMPRESS.

Jurisdiction — Salvage — Property under 1000*l. in value—The County Courts Admiralty Jurisdiction Act,* 1868 (31 *&* 32 *Vict. c.* 71, *s.* 9).

A salvage suit was instituted in the Court of Admiralty, in a sum exceeding 300*l.*, the value of the property saved was less than 1000*l.*:—

Held, that the Court had jurisdiction to entertain the suit.

THIS was a salvage suit instituted in a sum exceeding 300*l.*, to recover salvage reward for saving the steam-tug *Empress*. The *Empress* had been appraised, under a commission of appraisement, at the sum of 720*l.* only.

E. C. Clarkson moved, on behalf of the defendants, to dismiss the suit upon the ground that the Court had no jurisdiction to entertain a suit for salvage where the value of the property saved did not exceed 1000*l.* It was decided, in the case of *The William and John* (1) that this Court has no jurisdiction to entertain a suit for salvage where the value of the property saved does not exceed 1000*l.* That case was decided before the County Court Admiralty Jurisdiction Act, 1868, was passed; but there is nothing in that Act to restore to this Court the jurisdiction previously taken away.

(1) Br. & Lush. 49; 32 L. J. (P. M. & A.) 102.

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W. G. F. Phillimore, contrà. The effect of the provisions of the County Court Admiralty Jurisdiction Act, 1868, is to restore to this Court jurisdiction in salvage cases where the value of the property saved is under 1000*l.* No meaning can be given to the provisions of the 9th section of the Act which relate to suits "as to" salvage "in respect of property saved the value of which, when saved, does not exceed 1000*l.*;" unless the section has the effect of restoring to this Court jurisdiction in such cases: *The Bengal* (1), *The Dowse* (2), *The Herman Wedel.* (3)

Clarkson, in reply. The provisions in the 9th section relating to salvage causes may be intended to apply to cases arising within the jurisdiction of the cinque ports: *The Jeune Paul.* (4) Although the Court may be bound to presume that the legislature when it passed this Act was perfectly aware of the state of the law then existing, there can be no doubt that in point of fact the framer of the statute was in complete ignorance of the subject with which he was dealing. It is unreasonable to suppose that the legislature intended to restore by implication a jurisdiction which it had before taken away.

SIR ROBERT PHILLIMORE. I cannot say that it is a very satisfactory office that I have to discharge in placing a construction upon the 9th section of this statute. The point now raised is, however, one which I am considering not for the first time. I cannot put upon the section any other construction than that which I intimated, during the argument, seemed to me to be the reasonable construction. I think the Court has jurisdiction to entertain the suit. The 9th section confers upon this Court power to order proceedings as to salvage in respect of property saved, the value of which when saved does not exceed 1000*l.*, to be taken in this court; and enacts that if any person shall take proceedings in this court except by such order, he shall not be entitled to costs, and shall be liable to be condemned in costs unless the Court shall certify that it was a proper cause to be tried in this court. I think it is impossible to contend, in the face of these provisions, that the Court has not jurisdiction to try causes of salvage where the property

(1) Ante, p. 14.
(2) Ante, p. 135.
(3) 39 L. J. (Ad.) 30.
(4) Law Rep. 1 A. & E. 336.

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saved is under 1000*l.* The legislature cannot have intended to give the Court jurisdiction to order a particular case to be tried before it, and to certify that the case is fit to be tried before it, and at the same time to withhold from the Court jurisdiction to try the very cause.

Whether the present case is a case proper to be tried in this court is a matter upon which I give no opinion. That is matter for the discretion of the Court, and must be decided when all the facts are before it at the hearing. I must dismiss this motion, and allow the suit to be proceeded with.

Proctors for plaintiffs: *Dyke & Stokes.*
Solicitor for defendants: *Cooper.*

Feb. 13.

THE THRACIAN.

Practice—Form of Tender when no Costs are tendered.

A tender which does not contain an offer to pay costs must specify the grounds upon which the defendant contends the plaintiff is not entitled to costs.

THIS was a cause of salvage instituted against the *Thracian.* The defendants had tendered in act of Court the sum of 300*l.* The form of the notice of tender served on the solicitors of the plaintiffs was as follows:—

"Take notice, that I have this day paid into the Bank of England, to the credit of the Registrar of this Honourable Court, the sum of 300*l.*, which amount I tender to the plaintiffs in full satisfaction for the services proceeded for, exclusive of costs; the defendants reserving to themselves the right of contending that the plaintiff ought to be condemned in the costs of the suit, or ought not to have their costs."

E. C. Clarkson, on behalf of the defendants, the owners of the *Thracian,* moved the Court to direct the plaintiffs to declare forthwith whether they accepted or declined the tender.

R. E. Webster, for the plaintiffs, cited *The Hickman* (1), and submitted that the notice of tender was insufficient, on the ground

(1) Ante, p. 15.

that it did not state why the defendants contended that they ought not to pay costs.

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SIR ROBERT PHILLIMORE. I think it very desirable that the practice as laid down in *The Hickman* (1) should be strictly adhered to, and that a defendant in making a tender should either tender with costs or state that he tenders without costs, and specify the ground upon which he contends that the plaintiff is not entitled to costs. I think it right that parties should know why costs are refused. The tender in this case must be amended. I dismiss the motion, but without costs. (2)

Solicitor for defendants: *Cooper.*

Solicitors for plaintiffs: *Lowless, Nelson, Jones, & Goodman.*

THE HEINRICH.

Feb. 20.

*Solicitors' Lien for Costs—Charge upon Property preserved—*23 & 24 *Vict.* c. 127, s. 28—*Right to Priority of Payment out of Fund in Court.*

A foreign vessel was arrested in a suit instituted under the 6th section of the Admiralty Court Act, 1861 (24 Vict. c. 10). The master, who was a part owner, acting on behalf of himself and his co-owners, instructed solicitors to defend the suit. The solicitors defended the suit, and it was dismissed with costs. Afterwards suits were instituted against the vessel and freight in respect of claims for necessaries; in these suits claims were made for necessaries furnished after the institution of the former suit. The vessel having been sold, and the proceeds and freight having been brought into Court, and the solicitors for the owners of the vessel being unable to obtain payment of the costs incurred by them in defending the former suit:—

Held, that the solicitors were entitled to be paid out of the proceeds in court such costs in priority to the claims in respect of necessaries supplied after the institution of the first mentioned suit.

Held, also, that the claim of the solicitors for such costs was entitled to take priority of a claim preferred by the master for his wages.

ON the 15th of September, 1871, a suit (No. 5459) was instituted under the 6th section of the Admiralty Court Act, 1861, on

(1) Ante, p. 15.

(2) The tender was afterwards amended by striking out the concluding sentence, from the words "the defendants reserving to themselves the right of contending," down to the end of the tender, and substituting the following, "and I contend that the plaintiffs ought to be condemned in costs or ought not to be allowed their costs on the ground that this suit ought to have been brought in a county court having Admiralty jurisdiction."

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behalf of the owners of part of the cargo laden on board the *Heinrich*, a North German vessel, against that vessel and freight in the sum of 1200*l*. The vessel was arrested at Falmouth. Her master, Jacob H. Krull, was a part owner; and he, on behalf of himself and his co-owners, who were foreigners domiciled abroad, instructed Mr. Jenkins, a solicitor at Falmouth, to defend the suit. Mr. Jenkins accordingly caused an appearance to be entered by Messrs. Gregory, Rowcliffes, & Co., solicitors in London, on behalf of the owners of the vessel, and the usual steps were taken to defend the suit. The suit was brought to hearing, and on the 6th of June, 1871, the judge pronounced against the damage proceeded for, and dismissed the defendants from the suit and condemned the plaintiffs in costs. (1) On the 10th of November, 1871, a cause of necessaries (No. 5874) was instituted on behalf of Messrs. Alexander, against the vessel *Heinrich*. The bulk of the claim in this suit was in respect of necessaries supplied before the institution of suit 5459, but some items of the claim related to necessaries supplied after the institution of suit 5459. On the 19th of November, 1871, the judge pronounced in favour of the claim of the plaintiffs in suit No. 5874, but without prejudice to other claims, if any, against the *Heinrich*, and decreed the vessel to be appraised and sold. The freight had before been brought into court. On the 20th of December, 1871, a suit of necessaries (No. 5936) was instituted on behalf of Messrs. Van Weenen & Co. against the *Heinrich* and freight. The claim in this suit was for money advanced to the master of the *Heinrich* at Falmouth after the institution of the suit 5459, for the purpose of paying harbour dues, &c., and procuring necessaries. Some of these dues had been incurred before the institution of the suit. On the 9th of January, 1872, a cause of wages (No. 5963) was instituted on behalf of certain of the crew of the vessel *Heinrich*. On the 16th of January, 1872, *E. C. Clarkson*, on behalf of the solicitors for the owners of the *Heinrich*, moved the judge in court to declare that the said solicitors were entitled to a charge upon the *Heinrich* or the proceeds, and upon the freight, for their costs. In support of this motion an affidavit was filed by Mr. Jenkins, in which he stated that a copy of his bill of costs had been sent to the

(1) The case is reported, ante, p. 424.

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said J. H. Krull; that the sum of 625*l.* 4*s.* 3*d.* was due in respect of the said bill of costs. The plaintiffs in the suit had taken proceedings under the liquidation clauses of the Bankruptcy Act, and had offered a composition of 3*s.* 4*d.* in the pound on the amount of their liabilities, amongst which were ranked the defendants' taxed costs. The affidavit further stated that the whole of the owners of the *Heinrich* were residing in Germany, and were believed to be in poor circumstances and totally unable to pay any portion of the solicitors' charges against them.

R. A. Bayford, on behalf of the plaintiffs in suit No. 5936, opposed the motion.

The Court granted the motion, and an order was drawn up in the following form:—

Jan. 16, 1872. (No. 5459). The Judge, having heard counsel on behalf of the defendants and of claimants against the vessel *Heinrich*, pronounced that the solicitors for the defendants in this cause are entitled to a charge upon the vessel *Heinrich*, or the proceeds thereof when paid into court, and also upon the balance of freight now remaining in court, in respect of the transportation of the cargo lately on board the said vessel, and upon any other freight or sum or sums of money which may hereafter be recovered or preserved in connection with the said vessel, for their and their agents' taxed costs, charges, and expenses of and in reference to this suit, reserving all questions as to the priority of the various claims against the said vessel and freight; and he ordered that such costs, charges, and expenses be taxed accordingly, and gave leave to the various parties having claims against the said vessel to attend the taxation.

On the 20th of January, 1872, a cause of wages, No. 5983, was instituted on behalf of Jacob H. Krull, the late master, against the proceeds of the vessel and freight. On the 2nd of February, 1872, the Marshal filed commission of appraisement and account sales of the *Heinrich*, and bank receipt for the proceeds of the vessel. It appeared that the proceeds of the ship and freight were considerably less than 1200*l.*, the account in which the original suit (5459) had been instituted, and were wholly insufficient to satisfy the other claims against the property. On the 6th of February the amount of wages due to the crew having been agreed upon between the parties, the judge pronounced in favour of the claim of the plaintiffs in suit 5963, and ordered the sum due to them to be paid out of court. On the same day he pronounced in favour of the claim of the plaintiff in suit 5936, but without prejudice to

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other claims, and he referred the said claim, together with all questions as to priority of payment, to the registrar assisted by merchants to report thereon. After payment of the sums ordered to be paid to the plaintiffs in suit 5963, a balance still remained in the registry. On the 15th of February the solicitors for the defendants in the original suit (5459) filed their bill of costs certified to have been taxed at the sum of 603*l.* 5*s.* 9*d.*

Feb. 20. *E. C. Clarkson*, on behalf of the solicitors for the defendants in the original suit 5459, moved the judge to pronounce that the said solicitors were entitled to be paid the amount of their taxed costs in priority to the plaintiffs in suits 5874, 5936, and 5983, and to order the amount to be paid to Messrs. Gregory, Rowcliffes, & Co., out of the sum in court. The solicitors by successfully defending the original suit have preserved the ship and freight against the claims of the plaintiffs, and they are entitled to a charge upon the proceeds in court, by virtue of the 23 & 24 Vict. c. 127, s. 28. The claim of the plaintiffs in the original suit would, if it had been successful, have taken precedence of the claims for necessaries, and would have swept away the whole of the fund now in court. The solicitors for the defendants are entitled to stand in the same position as the plaintiffs in the original suit would have occupied if they had obtained judgment. Even independently of the statute, the Court has jurisdiction to distribute the proceeds equitably, and, according to the practice of the Court, established before the statute, a solicitor has a lien upon his client's interest upon any fund in court for costs incurred in protecting that interest.

R. A. Bayford, for Van Weenen & Co., the plaintiffs in suit 5936. The *Heinrich* being a foreign ship, Van Weenen & Co. have a maritime lien, which attached as from the time when the necessaries were supplied: *The Ella A. Clark* (1); and their claim must take precedence of the claim made by the solicitors for the owners of the ship. The solicitors for the owners cannot be in a better position than the owners themselves. The claim of the solicitors against the property did not exist until the Court declared that they were entitled to a charge under the statute, and any claim

(1) Br. & L. 32; 32 L. J. (P. M. & A.) 211.

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they may have against the property must be subject to previously existing liens. The solicitors should have exhausted every other means of recovering their costs, before enforcing their lien to the prejudice of the other claimants, and this they do not appear to have done.

H. H. Shephard, for Alexander & Co., the plaintiffs in suit 5874, and for J. H. Krull, the plaintiff in suit 5983. The statute gives the solicitor a charge upon the property not a lien. This charge is of no avail as against third parties.

[SIR ROBERT PHILLIMORE referred to the case of *The Jeff Davis*. (1)]

That case is contrary to the decision in *Hough* v. *Edwards*. (2)

The claim of the master for his wages is entitled to priority.

Clarkson, in reply. The master was a part owner, and he himself instructed the solicitors for the owners of the ship to defend the suit. It is clear, therefore, that the Court will not allow him to enforce his claim for wages until the costs incurred by his solicitors at his request have been satisfied.

As regards the plaintiffs in the suit for necessaries, a distinction may be drawn between the sums claimed in respect of necessaries furnished before the institution of the original suit and the sums claimed in respect of necessaries furnished afterwards. Even if the plaintiffs in the suits for necessaries are entitled to priority in respect of the former sums, they are not entitled to priority in respect of the latter. The lien of the solicitor for his costs relates back to the commencement of the suit in which these costs are incurred. The warrant of arrest in the original suit gave constructive notice to all the world of the existence of the proceedings in which the solicitors were employed, and of the paramount lien for damage to cargo which the plaintiffs in that suit claimed to be entitled to enforce. A person supplying necessaries to a ship under such circumstances does so periculo suo. He must be taken to know that he can only look to the balance of the proceeds remaining, after the claim of the plaintiff if the plaintiff is successful, or, after the claim of the solicitor of the defendants, if the defendants are successful, has been satisfied.

(1) Law Rep. 2 A. & E. 1. (2) 1 H. & N. 171; 26 L. J. (Ex.) 54.

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SIR ROBERT PHILLIMORE. In this case the sum in court is so far inadequate to answer all the claims proceeded for, that the sole question for my decision is whether the solicitors for the owners of the *Heinrich* are entitled to be paid their costs in priority to the other claimants. The *Heinrich* is a foreign ship, her owners are foreigners, and I think enough appears upon the papers before me to shew that they are unable to pay the costs due to their solicitors. The *Heinrich* was arrested in this court in a suit instituted under the 6th section of the Admiralty Court Act, 1861, and the plaintiffs in this suit would, if successful, have absorbed every farthing of the sum now in court. The solicitors who defended that suit successfully have, I think, both equitably and under the statute, placed themselves in the position of persons who have preserved the property. But as the proceeds of the property are now in court and under the control of the Court, I think the question as to their proper distribution is to be decided, not merely by looking at the words of the statute, but upon general principles. Having regard to the rights which solicitors in this court have always enjoyed, and to the principles laid down in *Haymes* v. *Cooper* (1), and the *Jeff Davis* (2), I think the solicitors for the owners of the *Heinrich* are entitled to priority over all claims for necessaries supplied after the institution of the original suit. But I must not be understood as intimating that the solicitors are entitled to priority over the claims in respect of necessaries supplied before the institution of the original suit, or over claims in respect of money advanced to pay dues incurred before the institution of the original suit.

As regards the claim of the master, it is clear that he cannot enforce his claim, his wages, to the prejudice of the claim of the solicitors he himself employed.

Solicitors for the owners of the *Heinrich*, the defendants in suit 5459: *Jenkins; & Gregory, Rowcliffes, & Co.*

Proctors for plaintiffs in suits 5874, 5963, 5983: *Fielder & Sumner.*

Proctors for plaintiffs in suit 5936: *Clarkson, Son, & Greenwell.*

(1) 33 Beav. 431; 33 L. J. (Ch.) 488. (2) Law Rep. 2 A. & E. 1.

10 Jur. N. S. 303

THE FRANKLAND. 1872
Jan. 31.

Amendment—Preliminary Act.

The defendants in a cause of damage applied to the Court when the cause was called on for hearing, and before any evidence had been taken, for leave to amend a statement in their preliminary act, and to make a similar amendment in the answer. The Court allowed the amendment to be made in the answer, but refused to allow any amendment to be made in the preliminary act.

THIS was a cause of damage instituted by the owners of the steamship *Kestrel* against the owners of the steamship *Frankland*. The petition alleged that at the time of the collision the weather had become thick with fog, and that the *Frankland*, at considerable speed, came into collision with the *Kestrel*. The defendants, the owners of the *Frankland*, had in their preliminary act stated the place of the collision to be "about four miles southward of the *Dudgeon* light-vessel." A similar statement was made in the answer. It was also stated in the answer that before the collision the *Kestrel* did not comply with the provisions of Article 16 of the "Regulations for Preventing Collisions at Sea." It appeared from the pleadings that at the time of the collision the *Kestrel* was on a voyage from Rotterdam to Hull, and the *Frankland* was on a voyage from Sunderland to London.

Jan. 31. The cause came on for hearing. Before any evidence had been taken:—

Milward, Q.C. (*E. C. Clarkson* with him), applied for leave to amend the preliminary act by striking out the words "about four miles," and inserting a statement that the collision took place about eight or six miles to the southward of the *Dudgeon* light vessel. They also applied for leave to make a similar amendment in the answer.

Butt, Q.C. (*R. A. Pritchard* with him), for the plaintiffs, objected to the amendment in the preliminary act being made.

SIR ROBERT PHILLIMORE. I am of opinion that the application to amend the preliminary act cannot be granted. The object of the preliminary act is to obtain from the parties statements of the facts at a time when they are fresh in their recollection, and this

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object would be entirely defeated if I allowed the preliminary act to be amended at the hearing of the cause. The same objection does not apply to the amendment of the answer, as the application has been made before any evidence has been taken. The answer may therefore be amended, but it will, of course, be competent to the counsel for the plaintiffs to comment upon the discrepancy between the answer and the preliminary act.

Proctors for plaintiffs: *Pritchard & Sons.*
Solicitor for defendants: *T. Cooper.*

Feb. 19.

THE SCOUT.

Salvage—Right of Charterer to Salvage Reward—Practice—Consolidated Salvage Suit—Right of Plaintiffs to appear by separate Counsel.

4 Ad. & E. 453.

By agreement between the owner of a steamer and C., C. agreed to charter the steamer for the purpose of running between certain named ports, and to pay a sum weekly for the use of the steamer until the agreement was determined in manner therein provided. The agreement provided that C. should pay all expenses of the crew and other expenses incidental to the running of the steamer, excepting only marine insurance, which was to be defrayed by the owner; that the steamer should be delivered up by C., on the termination of the agreement, in as good condition as at the time of making the agreement, reasonable wear and tear excepted; that the master should not, except in the event of his misconduct, be removed by C. without consent of the owner. The steamer, while running under this agreement, fell in with a disabled vessel and towed her into safety:—

Held, that C. was entitled to salvage reward, in respect of the service rendered by the steamer, and that the owner was not entitled to salvage reward.

When the interests of one of the plaintiffs in a consolidated salvage suit, is adverse to the interests of the other plaintiffs, separate counsel on his behalf may be heard at the hearing of the consolidated cause.

THE *Scout*, a steamer belonging to the London, Chatham, and Dover Railway Company, and the *Prince Frederick William*, a steamer belonging to Mr. Begbie, were under charter to Mr. Churchward, and were, with other vessels, employed by him in running between Calais and Cherbourg, with mails and passengers. On the 30th of January, 1871, the *Scout* left Cherbourg for Calais, and the next day she grounded a little to the west of Cape Blanc-nez, about six or eight miles from Calais. She shortly afterwards got afloat; but while she was in a disabled condition, the *Prince*

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Frederick William fell in with her, near the place where she grounded, and towed her into Calais harbour.

To recover reward for the services thus rendered, two salvage suits were instituted against the *Scout*, one on behalf of Mr. Churchward and one on behalf of the owner, master, and crew of the *Prince Frederick William*. The London, Chatham, and Dover Railway Company appeared as defendants in both suits. The suits were consolidated, and the conduct of the consolidated suit was given to the solicitor for the owner, master, and crew of the *Prince Frederick William*. The charter, or agreement for the charter, of the *Prince Frederick William* was in the following form:—

Kearsney Abbey,
Dover, January 28, 1871.

Thomas Sterling Begbie, Esq.,
Owner of P. S. *Prince Frederick William*,
4, Mansion House Place,
London, E.C.

SIR,—Referring to the negociations between Mr. A. B. Godbold and yourself, I agree to charter from you the S.-S. *Prince Frederick William*, from the 30th inst., for the purpose of running between Calais and Cherbourg or other intermediate French ports, and to pay you 40*l.* per week, payable weekly in advance, for the use of the steamer; it being understood and agreed that I am to pay all expenses of the crew, fuel, oil, tallow, dues, repairs, and all other costs and charges incidental to the running of the steamer, excepting only marine insurance, which is to be defrayed by you.

It is understood that this charterparty is to continue as long as the steamer is required by the exigencies of the French postal service to run between the above-mentioned ports, but terminable at any time by either party on giving seven days' written notice. The steamer to be delivered up by me on the termination of her employment under this charter at Dover, free of expense to you, in the same and as good condition as she is now, reasonable wear and tear excepted.

Captain J. R. Hepple is not to be removed from the command without your consent, except in the event of misconduct on his part.

J. G. Churchward.

The wages of the master and crew of the *Prince Frederick William* were paid by Mr. Churchward.

Feb. 19. The consolidated cause came on to be heard, and the facts above stated appeared to be admitted on the pleadings or proved by the evidence.

The Admiralty Advocate (*Dr. Deane, Q.C.*) and *E. C. Clarkson* appeared for the owner, master, and crew of the *Prince Frederick*

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William. They cited *The Collier* (1); *The Sappho* (2); *The Maria Jane*. (3)

Milward, Q.C., and *W. G. F. Phillimore*, for the London, Chatham, and Dover Railway Company.

G. Bruce, for Mr. Churchward. (4) The salving vessel was the principal agent in rendering the service; and the main question in the case is, whether the owner or the charterer is entitled to reward for the services rendered by her. The terms of the charter of the *Prince Frederick William* are such as to entitle Mr. Churchward to claim the share of the salvage reward, which would in an ordinary case be allotted to the owner. The services rendered by the steamer were rendered at his risk and at his expense.

[SIR ROBERT PHILLIMORE. What were the terms of the charter of the *Scout?*]

It does not appear. It must be presumed that the charter contained no special terms. Had it been otherwise, the defendants would have made it part of their evidence.

The Admiralty Advocate, in reply. By the terms of the charter it is provided that Mr. Churchward shall pay only such expenses as are incidental to the running of the steamer. That must mean incidental to the running of the steamer in the course of her regular employment. The services in question were therefore not rendered at the expense of Mr. Churchward, because they were not incidental to the regular employment of the steamer. Again, the steamer was not at his risk. It is provided by the charter the owner shall pay for the insurance of the steamer.

[SIR ROBERT PHILLIMORE referred to *The True Blue*. (5)]

The owner cannot be deprived of his right to salvage, unless the charter amounts to a demise of the vessel. The charter in the present case does not amount to a demise: *Fenton* v. *Dublin Steam Packet Co.* (6)

SIR ROBERT PHILLIMORE. I greatly regret that this suit has

(1) Law Rep. 1 A. & E. 83.
(2) Ante, p. 142.
(3) 14 Jur. 857.
(4) The Admiralty Advocate objected to Bruce being heard. Bruce contended that the interests of Mr. Churchward were opposed to those of the other plaintiffs in the consolidated suit, and that he had a right to be heard; and the Court so ruled.
(5) Law Rep. 1 P. C. 250, at p. 259.
(6) 8 A. & E. 835.

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been brought in this court at all. At the same time I cannot doubt that a salvage service has been performed, but it was of a very slight character, and was not attended with any danger to the salving vessel, or to her master and crew. The cases of *The Collier* (1) and *The Sappho* (2) clearly shew that the master and crew of the *Prince Frederick William* are entitled to reward for the services they have rendered. But the question, whether Mr. Begbie, the owner, or Mr. Churchward, the charterer, is entitled to salvage reward, is one of greater difficulty. Looking, however, at the terms of the charterparty of the *Prince Frederick William*, I am of opinion that Mr. Churchward was pro hâc vice owner of the vessel. He had to bear all expenses incidental to the running of the steamer, to pay the wages of the crew, and, in case of damage to the vessel, would have been bound to repair her. He, too, would have to suffer any loss arising from the detention of the *Prince Frederick William*.

As I consider the service rendered very trifling, I shall award to the charterer, master, and crew of the *Prince Frederick William* the sum of 30*l*. Although, as I have said, I do not think this cause ought to have been brought here, still, as there was a question of law to be decided, I shall not give the whole costs, but exercise the useful power which this Court has always possessed, and only award to the successful plaintiffs the sum of 25*l*. nomine expensarum, a sum which will approximate to the costs they would have been entitled to if the suit had been brought in the county court. As to the owner, Mr. Begbie, he has no claim to salvage, and therefore his suit, so far as he is concerned, is dismissed with costs. As the *Prince Frederick William* was the principal agent in the salvage service, I shall apportion the sum awarded thus; 20*l*. to the charterer, 10*l*. to the master and crew.

Solicitor for the owner and master and crew of the *Prince Frederick William*: *Shearman.*

Proctor for Mr. Churchward: *W. G. Jennings.*

Solicitors for the *Scout*: *Waltons, Bubb, & Waltons.*

(1) Law Rep. 1 A. & E. 83. (2) Ante, p. 142.

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Necessaries—3 & 4 *Vict. c.* 65, *s.* 6.

In 3 & 4 Vict. c. 65, s. 6, the word "necessaries" is used in the sense in which it is understood at common law.

The definition of the term "necessaries" given by Lord Tenterden in *Webster* v. *Seekamp* (4 B. & Ald. 352) adopted and applied in proceedings in Admiralty.

Semble, there is no distinction between necessaries for the ship and necessaries for the voyage.

The Comtesse de Frègeville (Lush, 329) observed upon.

THIS was a suit for necessaries instituted on behalf of W. H. Foget, of London, against the Norwegian vessel *Riga* and her freight. Ole Wasboe, a part owner of the ship, had been adjudged a bankrupt by the decree of a Norwegian court, and the person in whom the bankrupt's estate was vested intervened as defendant. A petition was filed on behalf of the plaintiff, the petition originally filed was afterwards amended in order that the exact nature of the items claimed might fully appear on the face of the petition. The amended petition was in substance as follows:—

1. The *Riga* is a Norwegian schooner, and on or about the 17th day of July, 1871, she sailed from the port of Durban, in Port Natal, Africa, laden with a cargo of wool bound for the port of London.

2. On or about the 6th day of September, 1871, the plaintiff received a letter from Ole Wasboe, part owner of the said schooner, bearing date Durban, the 18th of July, 1871, requesting the plaintiff to effect an insurance on the freight due for the transportation of the aforesaid cargo to the amount of 400*l.*

3. In pursuance of the request contained in the aforesaid letter, the plaintiff, on the 11th day of September, 1871, effected an insurance upon the said freight in the sum of 400*l.*, on payment of a premium of 2 per cent, and paid in respect thereof the sum of 8*l.* 1*s.*

4. In October, 1871, the plaintiff received a letter from the said part owner, Ole Wasboe, at St. Helena, dated the 2nd of September, 1871, confirming the instructions contained in the previous letter.

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5. In the month of November, 1871, the *Riga* arrived off the Scilly Islands, and the said Ole Wasboe landed and proceeded to London; and on the 20th of November, 1871, he had an interview with the plaintiff, at which the said Ole Wasboe, being without any funds to pay the necessary expenses arising on the arrival of the said ship, requested the plaintiff to make to the said Ole Wasboe an advance of 150*l.* against the said freight, in order to enable him to meet the aforesaid necessary expenses.

6. The plaintiff accordingly made the advance of 150*l.*, as requested, on account of the said freight, taking a receipt in the words and figures following, that is to say:

"London, 20 Nov. 1871. Received of W. H. Foget the sum of one hundred and fifty pounds, — shillings, — pence, on account of freight receivable in London of my vessel *Riga*, now bound here from Natal. 150*l.* O. Wasboe."

7. The said Ole Wasboe, also, at the same time handed to the plaintiff the ship's papers, and requested him to pay all charges for pilotage, light, tonnage, and harbour dues, and other necessary expenses on the arrival of the said ship; accordingly, on the arrival of the vessel at London the plaintiff paid charges for entering and reporting and piloting the said vessel, and for tonnage and light dues, and for noting protest, in all to the amount of 21*l.* 19*s.*, supplied goods for the necessary use of the said vessel to the amount of 1*l.* 10*s.*, and also advanced various sums for pilotage, travelling expenses of master, and other charges, amounting in the whole to 2*l.* 3*s.*

8. Shortly after the arrival of the *Riga* in the port of London, that is to say, on the 24th of November, 1871, the vessel and the cargo laden therein were arrested by the marshal of this honourable court on a warrant issued at the suit of one Cornelius Kraaz, claiming possession of the said vessel, and also claiming the said freight as the representative of the creditors in Norway of the said Ole Wasboe, the owner of the vessel; and on the 2nd day of September, 1871, a second suit was commenced in this honourable court against the said vessel and freight by the seamen then or lately serving on board in respect of claims for wages then due.

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9. The said freight was paid into court by the persons claiming the cargo, in order to obtain a release thereof.

10. The plaintiff also continued to act as agent and broker for the said vessel, and negotiated a charterparty on behalf of her said owners; and there is now due and owing to the plaintiff, as such agent or broker, in respect of his necessary services as such agent or broker, the sum of 48*l.* 0*s.* 6*d.*

11. The said insurance of freight was effected, the said advances made, the said charges paid, the said goods supplied, and the said services rendered by the plaintiff upon the credit of the *Riga* and of the said freight, and not on the personal credit of the aforesaid owners; and the whole of the said sums, amounting to 231*l.* 13*s.* 11*d.* are still due and unpaid to the plaintiff.

The petition concluded with a prayer to the judge to pronounce the said sums 8*l.* 1*s.*, 150*l.*, 21*l.* 19*s.* 5*d.*, 1*l.* 10*s.*, 2*l.* 3*s.*, and 48*l.* 0*s.* 6*d.* to be due to the plaintiff; and to condemn the said schooner or vessel *Riga*, and the freight due for the transportation of the cargo now or lately laden on board her therein; and in the costs of suit.

Feb. 13. *E. C. Clarkson*, on behalf of the defendant, moved to reject the petition. The items claimed do not fall within the category of necessaries. The word necessaries is a technical term well understood in this court, and it applies only to such things as are absolutely and immediately necessary for the ship.

R. E. Webster, for the plaintiffs. The term necessaries has no such limited meaning at common law. An authoritative definition of the term is given by Lord Tenderden in the case of *Webster* v. *Seekamp*. (1) The test is, are the expenses such as a prudent man would, under the circumstances, incur? The word "necessaries" in the statute 3 & 4 Vict. c. 65, s. 6, must be construed according to its well-established meaning; there is no reason why this Court should narrow its meaning.

Clarkson, in reply. The word "necessaries" has never received in this court so extended a meaning as that given to it at common law. At common law the question is simply what are the limits of the master's authority, but in this court the question is what

(1) 4 B. & Ald. 352.

constitutes a maritime lien. The legislature never intended a maritime lien to attach except in respect of supplies absolutely and unconditionally necessary.

The advance of 150*l.* mentioned in the 5th and 6th articles of the petition, at all events cannot be recovered: *The Comtesse de Frègeville.* (1) The advance was made on freight, and to a part owner of the ship, and by one who acted as shipbroker. Moreover, it does not clearly appear for what purposes the 150*l.* was advanced: it is consistent with the statement in the petition that the money was advanced not to procure necessaries but to pay expenses already incurred.

The following cases, in addition to those mentioned in the judgment, were cited during the argument: *Edwards* v. *Havill* (2); *Beldon* v. *Campbell.* (3)

Cur. adv. vult.

March 5. SIR ROBERT PHILLIMORE. This is a motion to reject a petition in a cause of necessaries instituted by a London shipbroker against the Norwegian vessel *Riga* and her freight. The ground of the motion is, that the items set forth by the plaintiff in the petition do not fall under the legal category of "necessaries," according to the construction put upon that term by my predecessor in this court. I have taken time to look into the various decisions upon which this proposition was alleged to be founded.

The 3 & 4 Vict. c. 65, s. 6, conferred upon this Court a "jurisdiction to decide all claims and demands whatsoever . . . for necessaries supplied to any foreign ship or sea-going vessel."

In the case of *The Alexander* (4), Dr. Lushington observed: "And here I may observe, that when the recent statute conferred upon this Court a jurisdiction in these matters, or rather perhaps revived an ancient jurisdiction long prohibited, it never was nor could be intended to alter the law, but merely to give a new remedy which was rendered necessary in the peculiar cases of foreign ships, and is confined to that necessity. I will state in one sentence what I apprehend to be the condition necessarily imposed

(1) Lush. 329.
(2) 14 C. B. 107; 23 L. J. (C.P.) 8.
(3) 6 Ex. 886; 20 L. J. (Ex.) 342.
(4) 1 W. Rob. 346.

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upon the Court. It is this: that the Court must not make the owners of a foreign ship liable for the supply of any articles for which, under similar circumstances, if resident here, they would not be responsible in a court of common law."

In the following case of *The Sophie* (1), the Court said: "The technical meaning of the term 'necessaries' I have already explained, as strictly applying to anchors, cables, rigging, and matters of that description; at the same time I consider myself at liberty to enlarge the term 'necessaries,' so as to include money expended upon necessaries; but in such cases I must be satisfied that the necessaries were wanting, and that the money was bonâ fide advanced for the purpose of procuring them."

In *The N. R. Gosfabrick* (2), the Court included meat as strictly falling within the term "necessaries." In *The West Friesland* (3), coals were held to be necessaries. In *The Onni* (4) it was holden that under this section it mattered not whether the necessaries were furnished on personal credit or not, and that the advance of money for procuring necessaries was within the equitable construction of the statute. This decision was in 1860; the statute had then been in force twenty years.

In a subsequent case, *The Comtesse de Frègeville* (5), in 1861, Dr. Lushington seems to have considered the proper legal meaning of the word "necessaries" still unfixed. In that case Dr. Lushington said: "I have to determine whether the demand made in this suit can be maintained within the statute of the 3 & 4 Vict. c. 65, s. 6, and this question wholly turns upon the proper legal meaning to be affixed to the word 'necessaries.' I have no hope of finding the means of solving this difficulty from resort to any other part of this statute, or to any other statute, neither has the question ever been submitted directly to the Court of appeal. In former times, and up to a later period, up to the decision in the case of *The Neptune* (6) by the Judicial Committee, the Court of Admiralty was accustomed to allow material creditors to sue against the proceeds when in court; material men were those who repaired a vessel, or furnished materials to enable her to proceed to sea; it was a

(1) 1 W. Rob. 368.
(2) Swab. 344.
(3) Swab. 454, S. C. on appeal to P. C. ib. 456.
(4) Lush. 154.
(5) Lush. 329.
(6) 3 Knapp, 94.

technical term, the meaning of which was well understood. I do not think, as my former decisions shew, that the term 'necessaries' in this statute should receive so circumscribed a meaning. On the other hand, it has been urged that the term 'necessaries' ought to receive the same liberal construction as in cases of bottomry. This construction would include every requisite for a voyage, for there are many articles allowed to be covered by a bottomry bond, which would be very difficult to comprise within any ordinary meaning attached to the word "necessaries." Unless enabled by superior authority, I cannot venture to adopt so comprehensive a meaning for this enactment. It appears to me that the most convenient course I can follow is to take an intermediate one, to make a distinction between the ship and the voyage; I shall hold that "necessaries" means primarily indispensable repairs,—anchors, cables, sails, when immediately necessary; and also provisions: but on the other hand, does not include things required for the voyage as contradistinguished from necessaries for the ship."

The attention of the Court does not seem to have been drawn to the previous case of *The Onni* (1), nor to the 24 Vict. c. 10, which had been passed in the month preceding the decision in *The Comtesse de Frègeville* (2), to which it seems to me very important to advert. The 4th section of that statute gives the Court a jurisdiction over "claims for building, equipping, or repairing any ship"—claims which would answer to those of the old material man, as known in this court before the decision in *The Neptune*. (3) The 5th section of the same statute gives the Court a distinct jurisdiction over "any claim for necessaries supplied to any ship" in certain cases. Since this statute, in the case of *The Bonne Amelie* (4), in 1865, it was decided that the travelling expenses of an agent to attend a trial in a case of collision were not necessaries; and in *The Aaltje Willemina* (5), in 1866, the Court refused to consider money advanced to a master to pay averages necessaries. In both these cases, however, and in other former cases, the Court seems to have considered that money advanced for the purchase of necessaries stood on the same footing as necessaries.

(1) Lush. 154.
(2) Lush. 329.
(3) 3 Knapp, 94.
(4) Law Rep. 1 A. & E. 19.
(5) Law Rep. 1 A. & E. 107.

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It appears to me, on a review of these cases, in which the Court seems to have proceeded tentatively, so to speak, with the new jurisdiction, and on a consideration of the language of both the statutes, that I must come to the conclusion that there is no distinction as to necessaries between the cases in which by the common law a master has been holden to bind his owner and suits for necessaries instituted in this court. This seems to have been Dr. Lushington's original opinion in *The Alexander* (1), and it seems to me strengthened by the language in the subsequent statute, and was, I think, also the foundation of my decision in *The Underwriter* in 1868. (2)

I am unable to draw any solid distinction (especially since the last statute) between necessaries for the ship and necessaries for the voyage; and I shall follow the doctrine of the common law as laid down by the high authority of Lord Tenterden in the case of *Webster* v. *Seekamp*. (3) In that case he says: "The general rule is, that the master may bind his owners for necessary repairs done or supplies provided for the ship. It was contended at the trial that this liability of the owners was confined to what was absolutely necessary. I think that rule too narrow, for it would be extremely difficult to decide, and often impossible, in many cases, what is *absolutely* necessary. If, however, the jury are to inquire only what is necessary, there is no better rule to ascertain that than by considering what a prudent man, if present, would do under circumstances in which the agent, in his absence, is called upon to act. I am of opinion that whatever is fit and proper for the service on which a vessel is engaged, whatever the owner of that vessel, as a prudent man, would have ordered if present at the time, comes within the meaning of the term 'necessaries,' as applied to those repairs done or things provided for the ship by order of the master, for which the owners are liable."

I have now to apply the principles of this law to the particular case before me.

I allow the sum of 8*l*. 1s. for insurance for freight as set out in articles 2, 3, and 4. I disallow the sum of 150*l*. as pleaded in articles 5 and 6, on the ground that though it is alleged in general

(1) 1 W. Rob. 346.

(2) 1 Asp. Mar. Law Cases, 127.

(3) 4 B. & Ald. 352.

terms that the sum was advanced for necessary expenses, it is not stated, as it ought to have been, what those necessary expenses were. I allow the sum of 21*l.* 19*s.*, 1*l.* 10*s.*, and 2*l.* 3*s.*, as set forth in the 7th article. 1872 THE RIGA.

With respect to the item of 48*l.* 0*s.* 6*d.* charged for brokerage in article 10, I shall allow this article to go to proof, reserving my opinion till I see what that proof is, as to whether the item falls within the legal category of necessaries or not. Subject to these alterations, I admit the petition. I shall make no order as to costs.

Solicitors for plaintiffs: *Cattarns, Jehu, & Cattarns.*
Proctors for defendant: *Rothery & Co.*

THE DEMETRIUS.

March 7.

Evidence—Practice—Consolidation of Suits—Admiralty Court Act, 1861 (24 *Vict. c.* 10), *s.* 34.

In consequence of a collision between vessels A. and B., both the vessels and also the cargo laden on board the A. sustained damage. A suit in rem was instituted by the owners of the A. against the B. to recover the damage done to their vessel. A cross suit was instituted by the owners of the B. against the A. These suits were heard and determined. Afterwards a suit in rem was instituted on behalf of the owners of the cargo on board the A. against the B. to recover the damage done to the cargo:—

Held, that the Court had no power to order the evidence taken in the suit brought by the owners of the A. against the B. to be admitted in the suit instituted on behalf of the owners of cargo.

In September, 1868, the screw steam-ship *Trojan* sailed from Alexandria for Glasgow with a cargo of beans. In the course of her voyage she put into the port of Liverpool, and there came into collision with the screw steam-ship *Demetrius*. The *Trojan* and the *Demetrius* were damaged by the collision, and in consequence of the collision the cargo of the *Trojan* was wetted by sea-water, and a portion of it was washed away. The owner of the *Demetrius* instituted a damage suit against the *Trojan*, and the owners of the *Trojan* instituted a cross suit against the *Demetrius*. On the 30th of July the two suits were heard together, and the

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Court pronounced both vessels to blame, but dismissed the suit against the *Trojan* upon the ground that at the time of the collision she was in the charge of a duly qualified pilot, employed by compulsion of law, whose orders had been duly attended to. On the 22nd of February, 1872, a cause of damage was instituted on behalf of Messrs. Notara, the owners of the cargo laden on board the *Trojan* at the time of the collision against the *Demetrius*.

March 5. *Milward, Q.C.* (*Butt, Q.C.*, and *Myburgh* with him), moved to be allowed to use at the hearing of this cause the whole of the evidence given at the hearing of the former cause against the *Trojan*. There has been no improper delay on the part of the plaintiffs, because a suit at common law, *Notara* v. *Henderson* (1), brought to recover compensation for damage to the cargo occasioned by reason of the neglect of the master of the *Trojan* to take proper care of the cargo after the collision, has only just been brought to a successful conclusion, and it was proper to determine the extent of the liability of the owners of the *Trojan* before taking proceedings to recover against the *Demetrius* compensation for the immediate damage. It is according to the ordinary practice of the Court that where there are two suits for damage, one brought by the owner of the damaged ship and the other by the owner of cargo, that the evidence taken in the one suit shall be received in the other: *The North American*. (2) It is clear that had the two suits been pending at the same time the Court would have consolidated the suits, and the plaintiff ought not to be prejudiced by the circumstance that the first suit was determined before the other was instituted: Admiralty Court Act, 1861, s. 34.

A. Cohen, contrà. The practice to receive in one suit evidence given in another, is, no doubt, commonly adopted, but only by consent of the parties, and for their convenience. The rule is clear that evidence taken in one suit cannot, without consent, be adduced in another suit between different parties. The Court cannot include in a consolidation order an action which has already been tried.

Cur. adv. vult.

(1) Law Rep. 7 Q. B. 225. (2) Lush. 79.

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March 7. SIR ROBERT PHILLIMORE. This is a motion for leave for the plaintiffs to be allowed to use at the hearing of this cause the whole of the evidence given and used at the hearing of the cause of collision between the two vessels the *Demetrius* and the *Trojan*, the plaintiff's cargo being on board the *Trojan*. The application of the plaintiff is opposed by the defendants, and I have to consider whether the Court has power to order the evidence to be admitted notwithstanding such opposition.

The practice in this court is invariable for parties to consent to an order that evidence used in one cause shall be used in another when the issue is the same. There is no case which shews that a contrary course has been followed. There is no case, however, in which the Court has, of its own authority and without the consent of the parties, made such an order. The law on this point is laid down in *The William Hutt.* (1) In that case Dr. Lushington said: "The universal practice of the Court has been to consolidate actions where the decision of each action depends on precisely the same facts; and in salvage suits the Court has gone further, consolidating actions where there are several sets of salvors not rendering precisely the same services. The power of consolidating actions is most beneficial. But for this power the owners of a ship would often be vexed by a host of different actions arising out of one matter—as in a case of collision by all the several owners of cargo in the vessel run down—and the Court could afford no relief, having no power to order the evidence in one action to be taken as evidence in another." From the law laid down in this case I deduce two propositions; first, that the Court has no power to consolidate actions after one has been heard and decided; second, that where one action having been heard and decided, another action is brought against the same ship arising out of the same matter, the Court has no power to make an order admitting the evidence in the first action as evidence in the second.

Reference has been made to the 34th section of the Admiralty Court Act, 1861. That section provides that the Court "may, on

(1) Lush. 25, at p. 27.

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application of the defendant in any cause of damage, and on his instituting a cross cause for the damage sustained by him in respect of the same collision, direct that the principal cause and the cross cause be heard at the same time and upon the same evidence, and if in the principal cause the ship of the plaintiff has been arrested or security given by him to answer judgment, and in the cross cause the ship of the plaintiff cannot be arrested, and security has not been given to answer judgment therein, the Court may, if it think fit, suspend the proceedings in the principal cause until security has been given to answer judgment in the cross cause." But I think it is clear that the provisions of that section cannot be applied to an action that has already been tried and determined.

I am of opinion that I have no power to make an order for the admission in this cause of the evidence in the former action, and I therefore reject this motion. I wish it to be understood, however, that I express no opinion upon the question of the propriety of the refusal of the defendants to consent to the admission of this evidence or as to how far that refusal may in the future affect the question of costs.

Neither must I be taken as expressing any opinion upon the question as to how far these parties are bound by the former decision as being a decision in rem.

Solicitors for plaintiffs: *Gregory, Rowcliffes, & Co.*
Solicitors for defendant: *Thomas & Hollams.*

THE BUSY BEE.

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April 23.

Practice—Appeal from County Court—Examination of Witnesses Vivâ Voce—Notes of Evidence in the County Court.

The court may order witnesses to be examined vivâ voce at the hearing of a cause of appeal from the county court. But such order will not be made except under special circumstances.

Wherever there is a probability of an appeal, notes of the evidence given in the county court should be taken by a reporter duly appointed, according to the provisions contained in the rules for regulating the Admiralty jurisdiction of the county courts.

THIS was a cause of appeal in a damage suit from the County Court of Northumberland.

E. C. Clarkson, on behalf of the appellants, moved for liberty to examine witnesses on the hearing of the appeal, and prayed that the notes taken by the judge should be admitted as evidence in the appeal.

The evidence of the witnesses examined in the county court had not been taken down by a shorthand writer or reporter, and the notes of the evidence taken by the judge of the county court were the only notes to be obtained. A copy of these notes, together with the proceedings in the court below, had been filed in the registry. It did not appear from the proceedings filed in the registry that the learned judge of the court below had given any reasons for his decision. The appellants had paid 20*l.* into the registry of the county court as security for the costs of the appeal.

An affidavit by one of the appellants filed in support of the motion contained the following statements :—

I have read a copy of the notes of the judge of the said county court in the said suit, and I say that it is impossible to understand the case on either side from the said notes. I, as a nautical man, cannot from the notes make out the position of the ships, there are many mistakes throughout the said notes, and I and my co-appellants are advised that this appeal suit cannot be properly heard on the said notes. I crave leave to refer to the said judge's notes, and the office copy thereof filed in the registry of the Honourable Court in this appeal suit. The said notes appear to be taken down merely to assist the said judge in the said suit, in

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the said county court, and for his own use, and not for the purpose of evidence to be produced and read before any other court or tribunal.

And I say that if the master and one other of the crew of each vessel were examined on the hearing of this appeal suit, with the assistance of the said judge's notes, there would then be a fair chance of the appeal court knowing what the evidence was. Two witnesses examined on each side, and the said judge's notes would in my opinion fairly bring the case before the court.

W. G. F. Phillimore, for the respondents, opposed the application. To establish the practice of allowing witnesses to be examined vivâ voce on appeals from the county court will occasion great inconvenience.

E. C. Clarkson, in reply.

SIR ROBERT PHILLIMORE. I am most reluctant to allow witnesses to be examined at the hearing of appeals from county courts. But in the peculiar circumstances of the present case I feel that I must accede to the prayer of Mr. Clarkson's motion, though the conclusion at which I have arrived must not be considered as affording a precedent for similar applications.

In this case two things concur to render it impossible for the Court to come to any satisfactory conclusion with reference to the merits of the case on the materials now before it. First, the notes of the evidence filed in the registry are very brief; they appear to be merely rough notes taken by the learned judge of the court below for his own guidance, and although no doubt they were sufficient for his purpose, they cannot be regarded as satisfactory for the purpose of an appeal. Secondly, I am without the assistance which, in many cases of this kind, I have derived from a statement of the reasons which influenced the Court below in arriving at the decision appealed against. I have not before me any statement of the grounds upon which the judgment of the Court below proceeded.

I wish to call attention to the 32nd rule of the General Orders for regulating the practice and procedure of the Admiralty Jurisdiction of the County Courts, 1869. By that rule it is provided that "at the request of either attorney, and at his cost in the first instance, or by order of the judge, at the cost in the first instance of the plaintiff, the evidence of witnesses examined in court shall be written down by a shorthand writer or reporter appointed by

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the Court, and sworn in each case faithfully to report the evidence." I think the meaning of this rule is, that notes of the evidence should be taken by some reporter at least in every admiralty cause where there is any possibility of an appeal. It may well happen that it may be unnecessary that these notes should be transcribed, but I think it was intended that in the event of an appeal the appellant should have it in his power to bring up a satisfactory report of the whole of the evidence. And certainly I am of opinion that the fact that this rule has not been followed must always be a circumstance to be inquired into when an appellant comes to this Court for leave to be allowed to adduce fresh evidence. In this case I shall, as has been suggested, give leave to each party to produce at the hearing of the appeal two of the witnesses examined on his behalf in the court below, but I shall only do this upon the terms that the appellants give further security for costs. The present security is insufficient. The appellants must give further security for costs in the sum of 100*l.*, and it may be given in this court.

Solicitors for appellants: *Nethersole & Speechly.*
Solicitors for respondents: *Deacon, Son, & Rogers.*

THE JENNY LIND.

April 30.

Master's Wages—Necessaries—Priority of Payment.

A master and part owner of a foreign ship ordered necessaries for the ship. The necessaries were supplied, and the master became liable for the payment of the same:—

Held, that the persons who supplied the necessaries were entitled to be paid for the necessaries out of the proceeds of the ship and freight in priority to a claim of the master for wages and disbursements.

THIS was a suit instituted on behalf of Johan Abrahansen, who was master and a part owner of the Norwegian ship *Jenny Lind*, against the proceeds of that vessel and her freight. The vessel had been sold in a former suit, and the balance of the proceeds of the vessel and her freight remaining in court amounted to little more than 100*l.* The petition stated that the plaintiff's total

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claim against the ship for wages and disbursements amounted to 151*l.* 2*s.* 9*d.* An appearance was entered on behalf of Gustav Lorensen, the managing owner of the ship, but no further proceedings were taken to defend the suit on his behalf or on behalf of any other of the owners of the ship. Messrs. C. & C. J. Northcote had instituted a cause of necessaries against the *Jenny Lind.* They intervened as defendants in the wages suit, and their proctors filed an answer. The answer was in substance as follows:—

In or about the month of September, 1871, the plaintiff—who was then part owner as well as master of the said vessel, *Jenny Lind*—employed the said defendants to act as agents for the said vessel, and to do the necessary business of the said vessel, and to make necessary advances in respect of the said vessel in the port of London; and the said defendants accordingly did the necessary business of the said vessel, and made necessary advances of money on behalf of the said vessel, and thereby supplied the said ship with necessaries. The exhibit hereto annexed marked A is a true copy of the account of the said defendants in respect of the said supply of necessaries, and the balance or sum of 28*l.* 15*s.* 4*d.* thereby appearing is still due and owing to the said defendants, and the plaintiff is liable to the said defendants for payment of the same. The proctors for the said defendants pray the right honourable the judge to declare that the said defendants are entitled to be paid the said sum of 28*l.* 15*s.* 4*d.* in priority to the claim of the plaintiff, and to order payment to be made to the said defendants of the said sum, together with their costs, out of the proceeds now in court; and that such further order as to costs and otherwise may be made as shall be just.

In the exhibit A annexed to the answer, amongst other items charged against the ship, appeared the following:—

"Draft to G. Lorentzen, 85*l.*
"Draft p. G. Lorentzen, 50*l.*"

G. Lorentzen was the managing owner of the ship.

April 23. *W. G. F. Phillimore*, on behalf of the plaintiff, moved to reject the answer. The fund in court is insufficient to satisfy the claims of the plaintiff and defendants, and the question to be decided is, which claim is entitled to priority. The claim of a master for wages and disbursements gives a maritime lien, and is entitled to priority over the claim of a mortgagee, and à fortiori over a claim for necessaries: *The Mary Ann.* (1) A master has the same remedies for the recovery of his wages as seamen have:

(1) Law Rep. 1 A. & E. 8.

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Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 191; and his claim is entitled to rank even before the claim of a bottomry bondholder: *The Salacia.* (1) The circumstance that the master is also a part owner does not affect his priority: *The Feronia:* (2) he is only liable for the necessaries jointly with the other part owners. The two sums 85*l.* and 50*l.* cannot be regarded as falling within the category of necessaries.

E. C. Clarkson, for the defendants, Messrs. Northcote. The master ordered the necessaries, and so rendered himself liable to the defendants to pay for them. This is expressly stated in the answer; and it is contrary to all principle that he should be able to enforce his own claim for wages to the prejudice of the claim of his unpaid creditors: *The Jonathan Goodhue.* (3) Notwithstanding the provisions of the 91st section of the Merchant Shipping Act, 1854, the claim of the master is postponed to the claim of the seamen, and the reason for this is that the master is liable by law to pay the seamen's wages, and so cannot compete against the seamen: *The Salacia.* (1) The case of *The Feronia* (2) does not apply, because in that case the master did not execute the instrument of mortgage. With reference to the drafts for 85*l.* and 50*l.*, they were, no doubt, drawn by the master for the necessary purposes of the ship.

Phillimore, in reply.

Cur. adv. vult.

April 30. SIR ROBERT PHILLIMORE. This is a question between two claimants, each possessing a maritime lien, as to the right to priority of payment out of a fund inadequate to satisfy the demands of both.

The master of this foreign ship, the *Jenny Lind,* claims in his petition 151*l.* 2*s.* 9*d.* as due to him for wages and disbursements. Certain material men who in England have supplied this ship with necessaries have intervened, and prayed that the sum of 28*l.* 15*s.* 4*d.* may be paid to them in priority to the claim of the master. Both parties have annexed an exhibit to their pleading—the master setting forth an account of his wages and disbursements; the

(1) Lush. 545. (2) Law Rep. 2 A. & E. 65.
(3) Swa. 524.

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material men an account of their supplies to the ship. No case has yet been decided by the Court as to whether the master or the material man is entitled to priority of lien. In this case, however, the master is also part owner. It must be taken that he ordered the necessaries that were supplied, and made application for the advances of money which were granted.

The contention on behalf of the master has been, first, that he has a priority of lien as master, of which he is not deprived by the fact that he is also part owner. It has been urged that as the statute 17 & 18 Vict. c. 104, s. 191, has given him the same lien as to his wages which the common seaman possesses, his claim ranks next to theirs, and that his claim has been decided to take precedence over that of the mortgagee and of the bottomry bondholder. The case of *The Feronia* (1), decided by me, has been cited as an authority for the first proposition. In that case it was ruled that the master, who was also a part owner, was entitled to priority of payment out of freight over the mortgagees. I adhere to my decision in that case, but I do not think that the analogy of it governs the case which is now before me. In *The Feronia* (1) the master, though part owner, had not mortgaged his share in the vessel, and I held that the mortgagee in possession, being obliged to acknowledge the lien of an ordinary master for his wages, was not discharged from his obligation by the fact that the master happened also to be a part owner; but that case would have assumed a very different aspect, and the master would have stood in a very different relation to the mortgagee, if he had been also one of the mortgagors. So with respect to the bottomry bondholder, it has been ruled that where the master has bound himself by the bond, he cannot obtain a preference for his wages over the claim of the bondholder. The master who has given the order to the material men is personally liable as on his own contract, and has also rendered his owner liable, for whom, as agent, he made the contract; and in both capacities, as master and owner, he is liable in this case to the creditor; as part owner, his ship has had all the advantage from the supplies of necessaries, and it would be a great injustice if he could cause that ship, so advantaged, to pay

(1) Law Rep. 2 A. & E. 65.

his wages, while, by so doing, he left unpaid his share of the debt for the necessaries which he had ordered. It has been urged that he is not solely liable for this debt, and that is true; but it seems to me far more equitable that this foreign part owner should be left to recover the proper contribution from the other foreign part owners than that I should make a decree which would have the effect of sending the English material man to hunt out his remedy and bring his action in a foreign country against the foreign owners, including the present claimant. Secondly, it has been contended on behalf of the master that the exhibit of accounts shews that advances have been made to the managing owner to an amount exceeding his claim, and that such advances were decided in the recent case of *The Riga* (1) not to be necessaries. But in the present stage of this cause, and on these pleadings, I think I am bound to assume that these advances were made with the sanction of the master, as part owner, and also that he will be entitled, as part owner, to his share of these advances paid to the managing owners.

In the circumstances of this case I think the material men ought to have priority, and I so decide.

The technical form which that decision takes is to admit the answer which has been objected to.

Proctors for plaintiffs: *Rothery & Co.*

Proctors for defendants: *Deacon, Son, & Rogers.*

(1) Ante, p. 516.

1872 THE GLENGABER.

June 14. *Salvage—Right of Owners of Salving Vessel to Salvage Reward in a case where some of them were also Owners of the Vessel which occasioned the Mischief.*

By the improper navigation of a steam-tug *B.*, a vessel at anchor was sent adrift and placed in jeopardy. A steam-tug, *W.*, rendered assistance to the drifting vessel:—

Held, that the owners of the *W.* were entitled to recover salvage reward for the services rendered, notwithstanding that some of them were also owners of the vessel which occasioned the mischief.

This was a salvage suit instituted on behalf of the owners of the steam-tugs *Black Prince, Sir George Grey*, and *Warrior*, against the ship *Glengaber*, her cargo and freight, and against her owners and the owners of her cargo intervening. The facts of the case were somewhat complicated, but so far as they are material they may be stated shortly as follows:—The *Black Prince* was towing the bark *Strathmore* up the river Mersey at about a quarter before 10 P.M. on the 8th of April, 1872. The *Glengaber* was lying at anchor in the part of the Mersey known as the Sloyne; the *Strathmore* came into collision with the *Glengaber;* the *Strathmore* sank, and the *Glengaber* was set adrift and came into collision with the bark *Indus* at anchor in the Sloyne, and set her adrift. The *Indus* and the *Glengaber*, with their yards locked, drifted together. The *Black Prince* got a hawser from the *Glengaber* and checked the drifting vessels, without, however, being able to stop them. The *Sir George Grey* came up and assisted the *Black Prince* to hold the vessels, and afterwards the *Warrior* made fast to the starboard side of the *Glengaber* and assisted to hold her. The *Glengaber* was afterwards towed by the *Warrior* and another tug to the Alfred Basin at Birkenhead. The owners of the *Glengaber* had instituted a suit for damage against the *Black Prince*, and in this suit the Court had pronounced that the *Black Prince* was to blame for the collision. It appeared in evidence that some of the owners of the *Warrior* were owners of the *Black Prince.*

The salvage suit came on for hearing on the 13th of June, and the hearing was continued on the 14th.

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THE GLENGABER.

Aspinall, Q.C., and *W. C. Gully*, appeared for the plaintiffs; *Milward, Q.C.*, and *Myburgh*, for the defendants.

SIR ROBERT PHILLIMORE. I have already decided that the *Black Prince* has failed in her defence as defendant in the suit of collision brought by the *Glengaber* against her, and I am of opinion that she cannot recover in this court salvage reward for services which were rendered necessary by her own misconduct. I shall therefore dismiss the claim of the *Black Prince* with costs. With regard to the *Warrior* it has been contended that that vessel is not entitled to be considered as a salvor, because it appeared in evidence that some of her owners were also owners of the *Black Prince*. This objection, if allowed to prevail, could not affect the claim of the crew, nor could it affect those owners of the *Warrior* who are not owners of the *Black Prince*, and in my opinion it cannot be sustained. I know of no authority for the proposition that a vessel wholly unconnected with the act of mischief is disentitled to salvage reward simply because she belongs to the same owners as the vessel that has done the mischief. I shall therefore hold that the *Warrior* is entitled to salvage reward.

[The learned Judge then proceeded to consider the circumstances affecting the amount of the reward, and awarded salvage to the *Warrior* and the *Sir George Grey*.]

Solicitors for plaintiffs: *Wright, Stockley, & Wright, Liverpool.*
Solicitors for defendants: *Duncan, Hill, & Parkinson, Liverpool.*

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May 6.

THE CHARLES.

Salvage—Services rendered on the High Seas by putting two of the Crew of a Ship on board a Vessel in distress for want of Hands—Right of Owners, Master, and Crew to participate in Salvage Reward.

A ship fell in on the high seas, in the winter season, with a brig in distress for want of sufficient hands to work her. The master of the ship sent two of his crew, who had volunteered to go, on board the brig, and by their assistance the brig was navigated safely into a British port. In consequence of the absence of the two men, the ship was exposed to risk, and the remainder of her crew had to undergo extra labour:—

Held, that not only the two men who went on board the brig, but the master and owners of the ship and the rest of the crew of the ship, were entitled to salvage reward for the services rendered.

This was a cause of salvage instituted on behalf of the owners of the ship *Jairus B. Lincoln*, and of the master and crew thereof, against the brig *Charles* and the cargo lately laden therein, together with the freight due for the transportation thereof, and against the owners of the said brig and the owners of her cargo intervening. The owners of the *Charles* and the owners of her cargo appeared separately and filed separate answers.

The cause now came on for hearing, and the facts admitted by the pleadings and proved in evidence were as follows:—The *Charles*, a brig of 246 tons register, having taken in a cargo of palm-oil and nuts, was on the 15th of November, 1871, lying in the Congo River, when the master went ashore on business connected with the vessel, in one of her boats, taking with him a crew of four hands, and leaving the mate and two seamen and the cook on board. During the night, and while the master and the boats' crew were ashore, a strong current caused the *Charles* to drag her anchor into deep water, and carried her out to sea; and the mate, thinking it would be attended with risk to attempt to work back to the Congo, shaped his course to Liverpool. On the 28th of January the *Jairus B. Lincoln*, an American ship of 1814 tons register bound for Falmouth, for orders, with a cargo of guano, and manned by a crew of twenty-two hands, all told, fell in with the *Charles* in latitude 46° 30′ N., and longitude 18° 45′ W. The *Charles* had her flag half-mast high, and her mate asked the master

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of the *J. B. Lincoln* whether he could spare a couple of hands to assist him to navigate his vessel. The mate of the *J. B. Lincoln* boarded the brig, and he found that one of the seamen who were on board the brig when she had been carried out to sea had died of fever, the other seaman was ill with the scurvy, and was just recovering from an attack of dysentery, and could render little or no assistance in working the vessel; and the mate and cook were much exhausted, for the brig had encountered a heavy gale a few days previously. The master of the *J. B. Lincoln*, out of several of his crew who volunteered to go on board the brig, selected two able seamen who went on board the brig. The mate of the brig gave a written acknowledgment to the master of the *J. B. Lincoln*, in the following form:—

"I hereby acknowledge to have received two men from the ship *J. B. Lincoln*, and that I will pay all expenses attached thereby; as my vessel is in distress for want of men, and cannot bring her in without help."

The *J. B. Lincoln* then proceeded on her course, and the brig made for Cork. The standing rigging of the brig was in bad order, she was badly found in provisions, and had no lime-juice, vinegar, or vegetables on board, and no medicine. The brig, according to the statement contained in a protest made by her mate, "met with an almost constant succession of strong winds and heavy seas, in which the vessel laboured and rolled heavily and shipped large quantities of water over all, at times completely flooding the decks both fore and aft, the pumps being attended in the best manner possible until the 8th of February, when at 11 A.M., being off Point Lynas, we received on board a Liverpool pilot." On the 9th of February the brig was taken into dock at Liverpool in safety. In consequence of the absence of the two men, the *J. B. Lincoln* and her crew ran risk and danger, and her crew underwent extra labour. It was agreed that the value of the *Charles* and freight was 1495*l.*, and the value of her cargo, after deducting freight, expenses of discharging, and other proper deductions, was 6679*l.*

Butt, Q.C., and *T. H. James*, for the plaintiffs. This was a

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salvage service, and the owners, master, and crew are all entitled to salvage reward: *The Active* (1); *The Roe* (2).

Myburgh, for the owners of the *Charles*. The only persons who can be said to have rendered salvage services are the two men who went on board the brig. They are not entitled to claim salvage reward, because they went on board the brig on the terms of the written agreement. By the agreement the services of the men were given on the terms that their expenses only should be paid.

Milward, Q.C., and *W. F. G. Phillimore*, for the owners of the cargo. The written agreement bars the claim to salvage reward at all events as against the owners of the cargo. The men agreed to give their services on the terms that their expenses should be paid by the master of the ship as the agent for the owners of the ship.

Butt, in reply.

SIR ROBERT PHILLIMORE. I am clearly of opinion that the putting these two men on board the *Charles* under the circumstances shewn in the case gives a right to salvage reward to the owners, master, and crew in due proportions, according to their respective merits. The written agreement, which has been relied upon by the counsel for the defendants, may, I think, be entirely laid aside in considering the question of salvage. I consider that that document was merely intended as a security that whatever happened the expenses of the two men who went on board the brig should be paid by the owners of the *Charles*.

With respect to the owners, the Court is inclined to think that they are not entitled to a large reward, as the ship itself did not render any assistance. Still the Court considers that they are entitled to some reward, as the ship and crew seem to have been subjected to very bad weather, and the period of the year at which the service was rendered made the risk of parting with two of the crew very considerable. Then the master is also entitled to share, as it was upon his responsibility that the two men were sent on board the *Charles*. It cannot, however, be doubted that the principal salvors were the two men who went on board the *Charles*, and it is impossible to read the protest made by the mate, and to hear the evidence without being convinced that a material service was

(1) 14 Jur. 606. (2) Sw. 84.

rendered. The two men had to put up with great discomfort and distress from the want of food and medicine; their labour was exhausting, and they ran risk from the ill-health of the others on board the *Charles*. The value of ship and cargo was 8174*l*. I shall award in respect of this service the sum of 400*l*. Of this I consider the two men who went on board the *Charles* are entitled to 200*l*.; to the crew left on board the *J. B. Lincoln* I shall apportion the sum of 100*l*. to compensate them for the extra labour thrown upon them by the absence of the other two. To the owners I give 50*l*., and to the master 50*l*.

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Solicitors for plaintiffs: *Bateson, Robinson, & Morris, Liverpool.*

Solicitors for owners of the *Charles*: *Thornely & Archer, Liverpool.*

Solicitors for owners of cargo: *Waltons, Bubb, & Waltons.*

THE RAJAH.

July 16.

Shipowner—Limitation of Liability—Damage to two Ships on one Occasion—The Merchant Shipping Act Amendment Act, 1862 (25 & 26 *Vict. c.* 63) *s.* 54—*The Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 506.

By reason of the improper navigation of a steam-ship she ran into and damaged a ship and immediately afterwards ran into and sank a steam-tug which was near the ship, and about to take the ship in tow. In a suit for limitation of liability instituted on behalf of the owner of the steam-ship it was held that the whole of the damage so caused by such improper navigation as aforesaid to the ship and steam-tug and goods on board the ship and steam-tug was caused substantially at the same time and on the same occasion, and that the plaintiff, who was entitled to have his liability limited according to the provisions of the 54th section of the Merchant Shipping Act Amendment Act, 1862, was entitled to have his liability in respect of the whole of such damage limited to an amount not exceeding 8*l*. per ton for each ton of his steam-ship's tonnage.

THIS was a suit for limitation of liability instituted on behalf of the owner of the steam-ship *Rajah* against the owner of the steam-tug *Admiral*, and against her master and crew, and against the owners of the ship *William Davie*, and also against all persons having or claiming any right, title, claim, or interest whatsoever with reference to or arising out of a collision which took place

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between the *Rajah* and the *Admiral* and *William Davie* on the 11th day of February, 1872.

The petition, which was in the ordinary form, alleged the existence of the facts necessary to entitle the plaintiffs to have their liability limited in accordance with the provisions of the 54th section of the Merchant Shipping Act, 1862, and the 13th section of the Admiralty Court Act, 1861. The second article of the petition was as follows:—

"On the 11th day of February, 1872, the *Rajah*, at one and the same time, came into collision with the steam-tug *Admiral* and the ship *William Davie*. The *Admiral* received so much damage in the said collision that she shortly afterwards sank, and the *William Davie* was considerably damaged."

No loss of life or personal injury was caused to any person by the collision.

The petition prayed the judge to pronounce that the plaintiff was not answerable in damages in respect of loss or damage to ships, goods, or merchandise, and other things caused by the collision to an amount exceeding 8*l.* per ton of the *Rajah*.

An answer was filed on behalf the owner of the *Admiral*. The first article of the answer was as follows:—

"In answer to the second article of the petition filed in this cause. On the 11th day of February, 1872, the steam-tug *Admiral*, in the said petition named, was in the mouth of the river Thames, about to take hold of and tow the ship *William Davie*, in the said petition named, which ship was riding to her anchor. The *Admiral* was a short distance off from the starboard bow of the *William Davie*, and with her engines working ahead, was being kept in position to enable those on board her to obtain the tow-rope of the *William Davie*, which they were about to do. Under these circumstances the *Rajah*, which was coming down the said river under steam, ran into and damaged the *William Davie*, and then ran into and sank the *Admiral*."

By the answer, the solicitor for the owner of the *Admiral* submitted to the judgment of the Court whether the plaintiffs were or not entitled to the relief prayed by the said petition, and prayed the judge to make such order as to him might seem just.

A similar answer was filed on behalf of the owners of the *William Davie*.

The allegations contained in the answers were not traversed by the plaintiff.

The cause now came on for hearing.

Butt, Q.C., and *Pritchard*, for the plaintiff. The only question

raised is whether the value of the *Rajah* at 8*l.* per ton is the measure of the plaintiff's liability in respect of all claims arising out of the collision, or whether he is liable to the same extent as he would have been if there had been two separate collisions on distinct occasions. The question turns upon the meaning of the 54th section of the Merchant Shipping Act, 1862. That section enacts that the owners of any ship shall not in the events there specified be answerable in damages in "respect of loss or damage to *ships*, goods, merchandise, or other things," to an aggregate amount exceeding 8*l.* for each ton, &c. The plural word "ships" is used advisedly, to express that the liability may be limited to the amount named, although damage may have been done to more than one ship. The 54th section of the Merchant Shipping Act, 1862, must be read in connection with the 506th section of the Merchant Shipping Act, 1854, which provides that the owner of every sea-going ship shall be liable for loss of or damage to goods "arising on distinct occasions" to the same extent as if no other loss or damage had arisen. The Act of 1862 is to be construed as part of the Act of 1854 (The Merchant Shipping Amendment Act, 1854, s. 1). It clearly appears to have been the intention of the legislature that in all cases where a ship has caused damage to several ships on one and the same occasion, the shipowner, if satisfying the requisitions of the statutes, should not be answerable for the whole damage to an extent exceeding the limit of 8*l.* per ton.

E. C. Clarkson, for the owners of the *Admiral* and *William Davie*. There are two distinct cases of loss or damage occasioned by reason of the improper navigation of the *Rajah*, and the plaintiff is only entitled to have his liability limited to 8*l.* per ton in each case. There were in fact two collisions, and the liability of the defendant in each case must be regarded independently of his liability in the other.

Butt, in reply.

SIR ROBERT PHILLIMORE. I think the 54th section of the Merchant Shipping Act, 1862, must be read in connection with the 506th section of the Merchant Shipping Act, 1854, and that it was the intention of the legislature that shipowners in cases where they are entitled to avail themselves of the provisions of the

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law limiting their liability should only be answerable in damages in respect of damage to ships, goods, or merchandise, caused on one and the same occasion, to an amount not exceeding 8*l.* for each ton of their ship's tonnage. In the present case, although the *Rajah* came into collision with two ships, yet the collision with each of those ships took place if not at the same moment of time, yet substantially at the same time and on the same occasion; and the whole damage done seems to have been caused by one act of improper navigation on the part of the *Rajah*.

I shall grant the decree prayed for by the plaintiff.

Proctors for plaintiff: *Pritchard & Sons.*
Solicitor for owners of the *Admiral*: *T. Cooper.*
Proctor for owners of the *William Davie*: *Waddilove.*

August 3.

THE IDA.

Bottomry Bond given to procure release of British Vessel under arrest at a Foreign Port not upheld.

P. D. 297
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In 1867 an English vessel, then at Monte Video, was chartered by W. to proceed with cargo to certain ports in South America. She took in the agreed cargo, and sailed according to orders, first to one and then to another of the ports of discharge named in the charter. A portion of the cargo was delivered, but the master failing to obtain any directions for the discharge of the residue, after considerable delay and after notice to the consignee, sold it to defray expenses. The vessel, after having been several other voyages, arrived at Buenos Ayres in 1868, and procured a charter to an English port. After this last-mentioned charter had been entered into, W. instituted legal proceedings at Buenos Ayres to recover damages for the non-delivery of the cargo shipped by him, and caused the vessel to be arrested for the damages so claimed. The arrest was under process valid according to the law in force at Buenos Ayres. By the advice of the British consul at Buenos Ayres, the master agreed with W. to compromise the dispute by giving to W. a bottomry bond for a sum of money considerably less than the amount claimed by him. The bond was given, and the vessel was released.

In a suit instituted on behalf of W. and his partner in trade against the vessel after her safe arrival home to enforce the bond:—

Held, that the circumstances under which the bond was given rendered it incapable of being enforced.

THIS was a bottomry suit instituted on behalf of Messrs. Wilson and Stevenson, merchants, against the schooner *Ida* and her owners, the defendants intervening.

The petition stated, that in the month of April, 1868, the *Ida*, belonging to the port of Whitstable, was lying at Buenos Ayres, bound on a voyage to Liverpool. Money being necessary to enable the vessel to prosecute her voyage, and her master being without funds or credit, he was obliged to, and did, borrow from the plaintiffs on bottomry the sum of 450*l*. By reason of the said advance the said vessel was enabled to, and did, prosecute her said voyage to Liverpool.

The answer was in substance as follows:—

1. On or about the 13th day of August, 1866, the schooner *Ida* left the port of Glasgow, on a voyage to Monte Video, under the command of Henry Pearson Coleman, her master. The *Ida* arrived at Monte Video on or about the 17th day of November, 1866.

2. In the month of February, 1867, the *Ida* being still at Monte Video, was, by a charterparty dated the 12th day of that month, chartered by the plaintiff, Robert Wilson, to receive from the plaintiff, or his order, a cargo of coals and other merchandise, and to proceed therewith to Corrientes, Paso de la Patria, or Cerrito, not higher than the Brazilian squadron was stationed, or as near thereunto as she might safely get, and deliver the same, on being paid freight at 40*s*. per ton; the vessel to be consigned to charterer's agents at port of discharge.

3. Under the said charterparty, the plaintiff, Robert Wilson, loaded, or caused the *Ida* to be loaded, with a cargo consisting of 202 tons of coals and 940 bags of bran. The said coals were the property of the plaintiff, Robert Wilson, but the said bran belonged to some other person or persons. The plaintiff, Robert Wilson, before the *Ida* left Monte Video, in performance of her said charterparty, upon the application of her master, made him an advance on account of the freight on the said coals, by giving to the said master the bill of him, the said plaintiff, on himself, at two or three months' date, for 404*l*. The said master was unable to get such bill cashed, and the said plaintiff thereupon cashed it for the said master for its amount, less 6*l*. per centum for interest and insurance; and he also deducted and retained a commission of 2*l*. 10*s*. per cent. on the freight of the said coals.

4. The *Ida* duly proceeded with the said cargo to Corrientes, where she arrived on the 1st day of June, 1867.

5. Before leaving Monte Video with the said cargo, the master of the *Ida* received from the plaintiff, Robert Wilson, a letter addressed to "Don Candido Gomez, consignee, per *Ida*," with instructions from the said Robert Wilson that such letter was for his consignees.

6. Upon the arrival of the *Ida* at Corrientes, the master of the *Ida* duly delivered the said letter, and made every due endeavour to obtain directions as to the discharge of the said cargo, and was ready and willing to proceed with the discharge thereof; but the plaintiff, Robert Wilson, and his consignees did not, nor would, receive the said cargo, and made default in giving directions as to the discharge thereof, and detained the *Ida* at Corrientes until the 25th day of the said month of June, when, and not before, the master of the *Ida* received orders as to the discharge of the said cargo, and was ordered to proceed therewith to Paso de la Patria, and there discharge the same.

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7. The *Ida* forthwith proceeded to Paso de la Patria with the said cargo, and arrived there on or about the 27th day of the said month of June, and the master of the *Ida* became entitled to have the said cargo received by the plaintiff, Robert Wilson, or his consignees, within a reasonable time, or within the time allowed by the custom of the port; but the plaintiff, Robert Wilson, and his consignees did not, nor would, receive the said cargo within such time as aforesaid, but up to the 27th day of the month of July, 1867, received only about one-half of the said cargo, and after that day did not, nor would, receive any further part of the said cargo; and the said ship was thereby detained until the 2nd day of August following, when the master of the *Ida*, being unable to get the residue of the said cargo received by the said Robert Wilson or his consignees, and to obtain the freight for the carriage thereof, and having been put to great expense by the aforesaid detention of the *Ida* at Corrientes, and the refusal and decision of the plaintiff, Robert Wilson, and his consignees to receive the said cargo, and being in consequence thereof in want of funds to defray the necessary expenses of the *Ida*, on the said 2nd day of August, 1867, sold a portion of the cargo of coals, and on or about the 5th day of the said month of August returned with the *Ida* to Corrientes, where he sold the rest of the said coals remaining on board the *Ida*. The said coals were sold by the said master with a view to obtaining payment of the balance of freight and his claims for demurrage and expenses caused by the detention and refusal aforesaid.

8. The *Ida* then made divers other voyages with other cargoes, after the completion of which she proceeded to Buenos Ayres in performance of a charter which had been obtained for her by her master to load a cargo there for carriage thence to Liverpool. She arrived at Buenos Ayres on or about the 10th of February, 1868, and commenced to load her said cargo for Liverpool.

9. Subsequently thereto, and whilst the *Ida* was still at Buenos Ayres and loading her cargo, the master of the *Ida* was summoned before the national tribunal of that place to answer the claim of the plaintiff, Robert Wilson, against the said master, in respect of the aforesaid sale by him of the aforesaid coals. By the advice of the British consul at Buenos Ayres, the said master consented to pay the said plaintiff, Robert Wilson, the sum of 450*l.*, being not only the full value of the cargo, a sum of money in respect of expenses alleged by the said plaintiff to be caused to him through the non-delivery to him or his consignees of the said coals, and ultimately, by the advice of the said consul, the master of the *Ida* executed a bottomry bond, set forth in the petition. No money passed upon the making of the said bond, which was given to secure the said sum of 450*l.* so agreed to be paid by the said master to the plaintiff, Robert Wilson, together with 20 per centum thereon as a premium, and not for any other purpose.

10. At the time of the making of the said bond the said Robert Wilson was liable and indebted to the master and owners of the *Ida* in a large sum of money, by way of demurrage and expenses of the aforesaid detention of the *Ida*, and the plaintiff has ever since been, and still is, so liable and indebted.

11. The defendants allege that the said charterparty of the 12th day of February, 1867, was entered into by the plaintiff, Robert Wilson, on behalf of himself and the plaintiff, Ebenezer Campbell Stevenson, who was and is the partner in trade of the said Robert Wilson.

12. The defendants allege that, under the circumstances hereinbefore set forth,

the master had no authority to grant the said bond, and that the said claim of the said Robert Wilson was not a fit subject for bottomry, and that the said bond was and is null and void.

The reply filed on behalf of the plaintiffs contained the following allegations:—

1. The master of the above-named vessel *Ida* wrongfully and improperly sold the said coals, in the answer in this cause mentioned, and thereupon and by reason thereof the defendants became and were liable to pay to the said Robert Wilson a large sum of money for the said coals, and for damages occasioned by the sale thereof.

2. By the law in force in Buenos Ayres the said Robert Wilson, as the owner of the said coals, had a lien on the above-named vessel *Ida* for the value of the said coals and for the damages, and such lien could be enforced by the arrest and sale of the said vessel.

3. On the return of the said vessel to Buenos Ayres, as in the said answer mentioned, the said Robert Wilson commenced an action in the national court there against the said ship (the said court being a court having jurisdiction in the premises) to recover the value of the said coals and the said damages, and the said ship was arrested in such suit.

4. After the said action was so commenced and the said ship arrested, and whilst the said action was in course of prosecution, the said master, on consultation with Her Majesty's consul at Buenos Ayres, who was also acting as agent to the owners of the said vessel *Ida*, requested the said Robert Wilson to withdraw such proceedings on being paid as a compromise the sum of 450*l.*, instead of a larger sum claimed by the said Robert Wilson.

5. The said Robert Wilson agreed to accept such sum of 450*l.*, and the said master having no funds or credit, he and the said consul duly advertised in the newspapers for the loan thereof on bottomry, but inasmuch as no person could be found willing to make such advance, the said Robert Wilson was requested by the said master and the said consul to make such advance on behalf of his Liverpool firm of Wilson & Stevenson, which request the said Robert Wilson complied with, and accordingly the bond set forth in the petition was executed, and the said schooner *Ida* was freed from the arrest of the said court, and the said suit compromised. The said bond was drawn up by filling in a common printed form of bottomry bond, as by the production of the said bond at the hearing of this cause will more fully appear.

6. By reason of the premises the sale of the said vessel by the said national court to satisfy the said claim of the said Robert Wilson was prevented, and the said vessel was enabled to prosecute her said voyage to Liverpool.

7. Save as herein appears the several allegations of the answer are untrue.

On the 31st of July and the 1st of August, 1872, the cause was heard. The depositions of witnesses taken under a joint commission at Buenos Ayres were put in evidence, and witnesses were examined vivâ voce. It appeared from the deposition of a lawyer in practice at Buenos Ayres that the national tribunal there has jurisdiction to arrest a ship in an action to recover damages for non-

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delivery of cargo, and it appeared from other evidence that the *Ida* had been arrested in due form of law at the suit of Robert Wilson as alleged in the third article of the reply. It further appeared that the owners of the *Ida* had written to Mr. Parish, H.B.M. consul at Buenos Ayres, requesting him to instruct the master of the *Ida* to return with the vessel to England, and should the master refuse to do so to place some one else in charge of the vessel, and have her chartered for England. The result of the rest of the evidence so far as is material appears from the judgment.

Butt, Q.C., and *W. G. F. Phillimore*, for the plaintiffs. By the law of the place where the bond was given the ship was liable to arrest for the non-delivery of the cargo, and she was actually under arrest. It was impossible for her to prosecute her voyage home until she was released. It was necessary to satisfy Wilson's claim in order to procure her release. The owners were anxious to get the ship home, and she was actually under charter to proceed to a home port, and under the circumstances it was obviously prudent to compromise Wilson's claim rather than incur expense and delay in defending a suit in a foreign court. All that was done at Buenos Ayres was done under the sanction of the consul. The circumstance that money did not actually pass between Wilson and the master does not affect the question, because substantially the transaction amounted to an advance of money by Wilson for the benefit of the ship. They cited *The Edmond* (1); *The Prince George* (2); *The North Star* (3); *The Karnak.* (4)

Milward, Q.C., and *Clarkson*, for the defendants. An actual advance of money for the necessities of the ship is the foundation of a valid bottomry transaction. Here there was no advance of money, the transaction was one merely of account between the parties. The master had no authority to give the bond for such a purpose; he had no authority to compromise the suit; he had no authority to turn an unliquidated into a liquidated claim with a bottomry premium. Wilson's claim, if maintainable at all, would have been overtopped by the defendant's claim for demurrage. Moreover, the claim arose in respect of a previous

(1) Lush, 57, 211; 29 L. J. (P. M. & A.) 76; 30 L. J. (P. M. & A.) 128.

(2) 4 Moo. P. C. 21.

(3) Lush, 45; 29 L. J. (P. M. & A.) 73.

(4) Law Rep. 2 A. & E. 289.

voyage, and had no connection with the enterprise on which the ship was engaged at the time the bond was given. The conduct of Wilson and his position with regard to the ship renders it impossible for the Court to uphold the bond. The circumstance that the claim in question was one in respect of which the vessel was under arrest is not by itself sufficient to render the bond valid, because it cannot alter the substantial nature of the transaction: *The Edmond* (1); *The Osmanli* (2); *The Augusta.* (3)

W. G. F. Phillimore, in reply.

Cur. adv. vult.

August 3. SIR ROBERT PHILLIMORE. In this case a question arises as to the validity of a bottomry bond. The material circumstances are as follows:—The *Ida* being an English vessel, lying at Monte Video, was chartered by the plaintiff Wilson to receive a cargo of coals and "proceed to Corrientes, Paso de la Patria, or Cerrito," . . . "and deliver the same agreeably to bill of lading on being paid freight as follows: forty shillings sterling in full." The master was to have "an absolute lien on the cargo for the recovery and payment of all freight, dead freight, and demurrage. . . . . The vessel to be consigned to charterers' agents at port of discharge. The freight be paid after true and right delivery as customary at port of discharge."

Two hundred and two tons of coals were loaded. Wilson advanced on account of the freight, under conditions certainly not unfavourable to himself, and on a bill at two or three months' date, 404*l.* This bill Wilson afterwards cashed.

The *Ida* proceeded to Corrientes with a letter from Wilson to Don Candido Gomez, the consignee of the cargo, and with instructions from Wilson to deliver it. The *Ida* arrived at Corrientes on the 1st of June, 1867. The letter was duly delivered; but Gomez seems not to have appeared; at all events, he referred the captain to one Reis as his agent.

Reis said the *Ida* must go on to Paso de la Patria, but the communication between Reis and the captain was not satisfactory, and the captain, after waiting six days and consulting the captain

(1) Lush, 57; 29 L. J. (P. M. & A.) 76.
(2) 7 No. Ca. 322. (3) 1 Dod. 283.

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of the port, advertised in a newspaper. About the 16th of June, the brother of Gomez appeared, but gave no orders. On the 19th of June the captain entered a protest. On the 25th of June this brother of Gomez again appeared with the bill of lading, he gave the bill of lading to Reis, and told the captain to take his orders from him. Reis told the captain to go to Paso, and he sailed next day, arriving there on the 27th of June. Three or four days afterwards he met Reis there. Reis began to discharge, and went on discharging slowly till the 25th of July. An arrangement had been made between the captain and Reis by which the former was to be allowed eighteen days for discharging the cargo and forty-eight hours waiting for orders—the rate of demurrage was to be 5*l.* per day.

The consignees had received about 109 tons when, on the 26th of July, the captain wrote the following letter to Reis:—

To Victor Reis.

"DEAR SIR—As you are acting agent for Candido Gomez, consignee of the above vessel, cargo of coal and brass, I now enclose you my bill for demurrage and expenses up till Monday next, and trust to have an immediate settlement of the same, or I shall place the cargo into other people's hands, and sell it to defray expenses.

"Your humble and obedient servant,
"Henry P. Coleman."

Then there follows the bill for demurrage, &c., which amounted to 1238 patacoons, I think they are called. Reis never came again for coals. On the 30th of July, Captain Coleman wrote another letter to Reis:

"DEAR SIR—I wrote to you on Friday last, the 26th inst., and sent you my bill for demurrage and expenses; you thought proper not to answer that letter, therefore I am obliged to send you another bill enclosed with this for the said demurrage and expenses, and if you fail in coming to a settlement before forty-eight hours after the delivery of this letter, I shall after the expiration of the said forty-eight hours sell the remaining cargo of coals to the highest bidder. Trusting you will come to an immediate settlement,

"I remain, dear Sir,
"Your most humble and obedient servant,
"Henry P. Coleman.

No answer was returned to these letters.

On the 1st, 2nd, 5th, and 14th of August, the captain sold the remainder of the coals, having returned on the 5th to Corrientes. The money obtained by the sale the captain says was applied

towards payment of balance of freight and claims for demurrage and expenses caused by his detention and the refusal of the consignees to receive the cargo. 1872 THE IDA.

The *Ida* then made divers other voyages with other cargoes, and on the 10th of February, 1868, arrived at Buenos Ayres, having previously obtained a charter for Liverpool. While loading her cargo the captain was summoned before the national tribunal at the suit of Wilson, and an embargo was laid upon the *Ida*. The captain found himself in great difficulty; the charterers threatening to withdraw their cargo, and he having no funds. The aid of the consul, Mr. Parish, was invoked, and he thinking the claim of Wilson on the whole maintainable, advised a compromise of the conflicting claims for 450*l*., and that the captain should raise this sum by bottomry and so procure the release of the ship. Mr. Parish says in his evidence—

"After some correspondence with Mr. Wilson, I persuaded that gentleman to accept a compromise, for the payment of all claims, the sum of 450*l*., which was the estimated value of the coal sold, with some additional expenses thereon. Captain Coleman, acting on my advice, accepted this arrangement, and by so doing the parties who were loading his vessel desisted from their intention to withdraw the charter. Captain Coleman having no money, was unable to pay the amount due to Mr. Wilson, and I had no alternative but to advertise for the money on bottomry; and no person tendering for the same, I induced Mr. Wilson to accept the risk, and to accept payment of his claim in this form. On his agreeing to do so, bottomry bills for the amount of 450*l*., with an additional premium of 90*l*., were drawn up and signed in the consulate, and Mr. Wilson withdrew the law proceedings, by a formal act, which I recommended him for his better security to enter into. The prohibition which should have been placed upon the sailing of the vessel was removed, and the ship proceeded to sea."

The bottomry bond was as follows:—

"Ten days after my arrival at the port of Liverpool I promise to pay to the order of Messrs. Wilson & Stevenson this my first bill of bottomry, second and third of this tenor and date not paid upon the schooner *Ida*, under my command, and bound on a voyage to Liverpool, being for amount of expenses incurred in this port, which sum of 540*l*. stg. excepting 90*l*. stg. for premium was actually laid out in disbursements and charges for the use of the said schooner, and to enable her to proceed on her present voyage, and for the payment of which sum of 540*l*. stg., in lawful money of Great Britain, ten days after my arrival at Liverpool as aforesaid, I do hereby bind myself, my heirs, executors, and administrators, firmly by these presents, and particularly the said schooner, together with all her tackle and apparel, and it is hereby declared that the same are thus assigned over for the security of the said 540*l*. stg., and shall be delivered to no other use or purpose whatever until payment of this bill or bond is first made, with the premiums due thereon."

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And the usual conclusion follows :—The bond is signed by Captain Coleman, the master, and Mr. Parish, British consul at Buenos Ayres.

The recital as to the money being "actually laid out in disbursements and charges" is untrue; this recital is indeed part of the printed form of the bond; but, nevertheless, I regret to see it, and I am somewhat surprised that it escaped, as it must have done, the notice of the consul.

The fact is, that no money passed at all between Wilson and the captain, and that the bond was not for disbursements or charges, but to obtain the release of the ship seized and detained on what was in truth a matter of account between the parties to it. Was such an instrument, drawn in such circumstances, a legal bottomry bond?

In the case of *The Karnak* (1) I reviewed at length and carefully considered all the decisions of this Court bearing upon the subject of bottomry bonds granted for the purpose of raising money to obtain the release of a British ship detained in a foreign port on account of a lien allowed by the municipal law of that port.

I adhere to the principles of law laid down in that case with the greater confidence because they were subsequently approved of by the Privy Council. I think it expedient to refer to two of the authorities cited and relied on by me in *The Karnak*. (1) In the case of *The Prince George* (2), before the Privy Council, their Lordships said :—

"If it had been proved that the law of New York gave the lien upon the ship, as suggested, we should have thought, upon the general principle, that where the master cannot in any other way raise money, which is indispensably necessary to enable the ship to continue her voyage, he may hypothecate the ship, this power would extend to a case where the ship might be arrested and sold for a demand for which the owner would be liable. It seems immaterial whether the necessity for funds arises from such a demand, or to pay for repairs, stores, or port duties."

I do not know, however, that the law upon this subject has as yet been carried further than to hold valid an hypothecation on account of a lien by a creditor in a foreign port for the necessary expenses and charges in respect of the ship and crew in that port. It is not necessary to decide whether the principles laid down in *The Prince George* (2) and *The Karnak* (1) might be con-

(1) Law Rep. 2 A. & E. 289. (2) 4 Moo. P. C. at p. 25.

sidered to cover the case of a bottomry bond given for the purpose of raising money not to be raised in any other way, and to repeat the language to which I have just adverted, "which was indispensably necessary to enable the ship to continue her voyage," without reference to the character of the expenses to be defrayed by the money received.

I say it is not necessary to make a decision upon this point, because the case before me presents a circumstance which raises another principle of the greatest importance relative to instruments of this peculiar character, namely, the capacity of the particular person to become the obligee of such a bond, or, in other words, the capacity of the captain to grant the bond to Wilson. It is contended by the defendants that the failure of Wilson to fulfil his contract with respect to receiving the cargo by himself or his consignees within a reasonable time at the proper port, caused the expenses in order to defray which the sale of the coal became necessary, which act subsequently necessitated the bottomry bond; and now it is not denied that such default was made by Wilson. His contention is that, nevertheless, on a balance of accounts between him and the captain, the latter is still his debtor; and therefore he arrested the vessel. In *The Karnak* (1) I cited a decision bearing on this point of Mr. Justice Story, which I will now read. That very learned judge said:—

"It is undoubtedly true that material men and others who furnish supplies to a foreign ship have a lien on the ship, and may proceed in the Admiralty Court to enforce that right; and it must be admitted that in such a case a bonâ fide creditor who advances his money to relieve the ship from an actual arrest on account of such debts may stipulate for a bottomry interest, and the necessity of the occasion will justify the master in giving it if he have no other sufficient funds or credit to redeem the ship from such arrest. But it would be too much to hold, as was contended for by the counsel for the appellants, that a mere threat to arrest the ship for a pre-existing debt would be a sufficient necessity to justify the master in giving a bottomry interest, since it might be an idle threat which the creditor might never enforce, and until enforced the peril would not act upon the ship itself; and if, supposing a just debt might in such a case be a valid consideration to sustain a bottomry interest in favour of a third person, such an effect never could be attributed to a debt manifestly founded in fraud or injustice. Nor does it by any means follow, because a debt sought to be enforced by an arrest of the ship might uphold an hypothecation in favour of a third person, that a general creditor would be entitled to acquire a like interest. It

(1) Law Rep. 2 A. & E. at p. 307.

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would seem, as against the policy of the law, to permit a party in this manner to obtain advantages from his contract for which he had not originally stipulated. It would hold out temptations to fraud and imposition, and enable creditors to practise gross oppressions, against which even the vigilance and good faith of an intelligent master might not always be a sufficient safeguard in a foreign country."

That is the case of *The Aurora.* (1)

Now, by accepting this bottomry bond Wilson has not only converted a personal debt into a bottomry transaction, but he has, as Mr. Clarkson clearly and forcibly said, turned an unliquidated into a liquidated claim with a bottomry premium. I am of opinion that it was not competent to him to take this step. I agree with the opinion of my predecessor in this chair, that bottomry bonds ought to be, so to speak, favoured by this Court; that is, that the interests of commerce require that they should not be invalidated upon technical or minute grounds. But to pronounce for the validity of this bond in the circumstances which I have stated, and in the hands which now hold it, would be to introduce a new principle into the law relating to these instruments, which would be, I think, contrary to the foundation on which they rest, and not conducive to the interests of commerce. I must decree in favour of the defendants, with costs.

Proctors for the plaintiffs: *Toller & Sons.*
Solicitor for the defendants: *Thomas Cooper.*

(1) 1 Wheaton, 96.

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June 10.

Collision—Regulations for Preventing Collisions at Sea, Articles 15, 18, 19—*Duty of Steam-tug with a Vessel in tow to keep out of the Way of a sailing Vessel.*

A schooner, close hauled on the starboard tack at night, saw the starboard light and the two towing lights of a steam-tug three points on her port bow about a mile off. The schooner kept her luff. The steam-tug had a fully laden ship in tow, and was steaming against a head wind in the open sea. The steam-tug kept her course until it was too late to get out of the way of the schooner, and the steam-tug and the schooner came into collision:—

Held, that the schooner was right in holding her course, and that the steam-tug was alone to blame.

THIS was a cause of damage instituted on behalf of the owners of the schooner *Triumph* against the steam-tug *Warrior*.

The petition alleged that the schooner was close hauled on the starboard tack when those on board her observed the two masthead lights and the green light of the *Warrior* about a mile off and about three points on her port bow. The schooner kept her luff, but the *Warrior* approached the *Triumph*, and notwithstanding that she was loudly hailed by those on board the *Triumph* to put her helm hard a-port she came into collision with the schooner.

The defendants in their answer alleged among other things in substance as follows:—

The *Warrior* was towing the ship *Woosung*, of about 800 tons burden, from Liverpool towards Holyhead, and had arrived at a point about five miles east of the Skerries and about four or five miles distant from the Anglesea coast.

The *Woosung* was fully laden, and the *Warrior* was towing with about seventy fathoms of hawser out. It was blowing a strong breeze from the west, and the *Warrior* and her tow were heading west and going about two knots.

At this time the red light of the *Triumph* was seen on the starboard beam of the *Warrior*, and about a mile distant. The *Warrior* kept her course until the *Triumph* was about 100 yards distant and right abeam. The *Warrior* was then hailed from the *Triumph* to go under the schooner's stern, whereupon the master of the *Warrior*, perceiving that the *Triumph* persisted in trying to cross his bows, gave the order to put the helm hard a-port, and to slow and reverse the engines. This was immediately done, and the head of the *Warrior* was brought round to about W.N.W., when the *Triumph* struck the stem of the *Warrior* with her port side.

The result of the evidence appears from the judgment.

Butt, Q.C., and *P. Myburgh*, for the plaintiffs. The schooner

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was bound to keep her course, and the *Warrior* was bound to keep out of her way. A steam vessel, though she have a ship in tow, is still subject to the rules which apply to steam vessels: *The Cleadon.* (1)

Aspinall, Q.C., and *W. C. Gully*, for the defendants. A steam-tug with a ship in tow cannot be manœuvred without great difficulty, and the ordinary rules which apply to steam vessels cannot apply to a steam vessel thus encumbered. The schooner saw the two towing lights, and therefore had notice that the steamer had a vessel in tow, and she ought not to have kept on her course. Even if under ordinary circumstances the 15th article of the "Regulations for Preventing Collisions at Sea" applies to a steam-tug with a vessel in tow, yet in the special circumstances of this case it ought not to apply here. The *Warrior* was towing a heavily laden ship in the open sea against a strong head wind, and the provisions of the 19th article justified a departure from the rule laid down by the 15th article: *The Arthur Gordon* and *The Independence.* (2)

Butt, Q.C., in reply.

SIR ROBERT PHILLIMORE. This is a case of collision between a vessel called the *Triumph*, of eighty-two tons, with a crew of three hands, and laden with coal, going from Queen's Ferry, in Flintshire, to Dundalk, in Ireland, and the *Warrior*, a steam-tug of seventy-two tons register, with engines of eighty horse power, and manned by a crew of eight hands. The *Warrior* at the time of the collision was towing a ship called the *Woosung*, of about 800 tons. The place of collision was four or five miles off the Skerries —to the east of the Skerries. The wind at the time was W., and the tide was flood about three-quarters of an hour before high water. The night was what is called dark, but clear, a description with which we are very familiar in this court.

Now the schooner was close hauled on the starboard tack, and heading S.S.W., and, according to her evidence and her narrative, she saw the starboard light and the two towing lights of a steamer three points on her port bow about a mile off. The schooner deliberately, as her master has told us this morning, kept her course, conceiving that she lay under an obligation to do so, accord-

(1) Lush. 158; 14 Moo. P. C. 92. (2) Lush. 270; 14 Moo. P. C. 103.

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ing to the sailing rules. The steamer struck her on the port quarter, abaft the main rigging, and she sunk soon afterwards. The steamer was towing, as I have said, a ship of 700 or 800 tons, and she saw the port light of the schooner on her starboard beam about a mile off.

Now she says that she did nothing till within 100 yards, and when she had come within that distance, and was continuing to approach the schooner, the schooner hailed her to go astern, which she attempted to do, but she did not quite succeed, and struck the schooner, as I have said.

The articles of the "Regulations for preventing Collisions at Sea," applicable to this case, are the 15th:—"If two ships, one of which is a sailing ship and the other a steam-ship, are proceeding in such directions as to involve risk of collision, the steam-ship shall keep out of the way of the sailing ship:" the 18th: "Where by the above rules one of two ships is to keep out of the way, the other shall keep her course, subject to the qualifications contained in the following article:" and the 19th: "In obeying and construing these rules, due regard must be had to all dangers of navigation; and due regard must also be had to any special circumstances which may exist in any particular case rendering a departure from the above rules necessary, in order to avoid immediate danger."

The steamer's contention is, that her case falls under the 19th rule. There were dangers of navigation, and particular circumstances which justified her in expecting that the schooner would get out of her way, and she alleges that the schooner might safely have done so by tacking, or by going under the stern of the vessel in tow, I presume.

I have, of course, taken the opinion of the Elder Brethren on these points, and they are of opinion that there were no dangers of navigation, and no special circumstances which justified a departure from the ordinary rule that a steam-ship shall keep out of the way of a sailing vessel. On the contrary, they think that the *Warrior* might have avoided the collision, according to the evidence of her own master, either by starboarding or by porting at an earlier period than she did, or that she might have stopped at an earlier period, in which case again there would have been no collision.

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I have considered the case of *The Arthur Gordon* and *The Independence* (1), but it does not appear to me to affect the conclusion at which I have arrived.

I pronounce the *Warrior* alone to blame for the collision.

Solicitors for plaintiffs: *Thornely & Archer, Liverpool.*

Solicitors for defendants: *Wright, Stockley, & Becket, Liverpool.*

June 28.

THE LE JONET.

Salvage—Right of a Seaman to claim Salvage for Services rendered to his own Vessel.

Part 564

Two vessels came into collision on the high seas. One of the vessels (a barque) received damage, and all her crew, except her mate, escaped on board the other vessel. The mate of the barque remained on board her, and navigated her until he obtained assistance from a steam vessel. The steam vessel then took the barque in tow and brought her into port in safety, the mate still assisting in her navigation:—

Held, that in awarding salvage to the owners, master, and crew of the steam vessel, the right of the mate of the damaged ship to claim salvage reward for his services should be taken into consideration, and that the mate, upon his claim being brought before the Court, was entitled to rank as a salvor.

THE barque *Le Jonet* was run into by the Spanish barque *Isabellita Blanca*, on the evening of the 3rd of April, 1872. The *Isabellita Blanca* with her starboard side came into collision with the *Le Jonet*'s stem and port bow, cutting down the bowsprit and damaging the stem and port bow. The two vessels held together for some time, during which the master and all the crew of the *Le Jonet*, except the mate, went on board the *Isabellita Blanca*. The mate of the *Le Jonet* remained on board his own vessel. After a little while the vessels got clear, and the mate got the *Le Jonet* before the wind and kept her before the wind for some hours till the wind moderated, when he laid the vessel by the wind, and at daybreak he hoisted a signal for assistance. The *Colletis*, an iron screw steam vessel, saw the signal about 5.30 on the morning of the 4th of April, and proceeded to the *Le Jonet*. Some of the crew of the *Colletis* went on board the *Le Jonet*, and a hawser was passed between the two vessels, and the

(1) Lush. 270; 14 Moo. P. C. 103.

Le Jonet was towed in safety by the *Colletis* into the port of Hull. The vessels arrived at Hull about 3 P.M. on the 5th of April. During a portion of the time the *Le Jonet* was being towed her mate remained at her helm. When the *Le Jonet* arrived at Hull she had eight feet of water in her hold, and hands were engaged to work at her pumps to prevent her from sinking.

On the 10th of April the present suit was instituted on behalf of the owners, master, and crew of the *Colletis* against the *Le Jonet* to recover salvage reward. The *Le Jonet* was arrested in the suit on the 11th of April, and remained under the arrest of the Court until she was sold by an order of the Court, made on the 4th of June. The net proceeds, after deducting the expenses of the sale, amounted to about 807*l.*

The petition filed on behalf of the plaintiffs set out the facts relating to the services rendered. It also stated that since the arrest of the vessel the owners of the *Colletis* had employed men to keep the *Le Jonet* afloat, and had incurred a considerable sum of money on that account.

The *Colletis* at the time of rendering the services was of the value of 7000*l.*, her cargo was of the value of 6500*l.*, and her freight was of the value of 113*l.*

The owners of the *Le Jonet*, in answer to the petition, denied some of the statements therein contained; but the main facts of the case were not in dispute. The result of the evidence on the disputed facts will be found stated in the judgment.

E. C. Clarkson appeared for the plaintiffs.

[SIR ROBERT PHILLIMORE. The mate of the *Le Jonet*, who appears to have rendered important services, is not before the Court.]

He is not entitled to claim as a salvor, because he cannot claim salvage reward for services rendered to his own vessel: *The Neptune.* (1)

G. Bruce, for the defendants. The mate is entitled to claim salvage reward: *The Warrior* (2); and although he is no party to the present suit, the Court, in awarding salvage to the plaintiffs, must bear in mind the services of the mate. The present plaintiffs

(1) 1 Hagg. Adm. 227. (2) Lush. 476.

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are not to be rewarded for what the mate has done, and whatever amount the Court may think right to award for the whole salvage service, a portion of that must be reserved for the mate, who may yet institute a suit to recover what is due to him.

[SIR ROBERT PHILLIMORE. Surely it will be to the advantage of the parties to save the expense of another suit.]

Bruce. The owners of the *Le Jonet* highly appreciate the gallant conduct of the mate, and will be glad to consent to the Court adjudicating upon the claims of the mate in the present suit. They will undertake to pay over to the mate whatever sum the Court may declare him to be entitled to.

Clarkson. The plaintiffs in the suit contend that the mate is not entitled to salvage reward, but they are quite willing to consent that the question should be determined in the present suit.

Bruce. The plaintiffs are not entitled to receive the expenses incurred by them in hiring men to pump after the time when the vessel was arrested. During the time the vessel was in the custody of the marshal of the court he was the person responsible for the vessel, and everything necessary for the safety of the vessel should have been done under his direction.

Clarkson. It was necessary that the pumping should be done by some one, and the expenses must be paid out of the proceeds in one way or another.

SIR ROBERT PHILLIMORE. This is a salvage suit for services rendered to a vessel injured by collision. The barque *Le Jonet* was run into by the Spanish barque *Isabellita Blanca*, on the 3rd of April, 1872, between 8.0 and 8.30 P.M., about twenty-five miles S.E. by S. off Lowestoft. The consequence of this collision was that serious damage was inflicted upon the barque *Le Jonet*, and her master, and all her crew, except one man, the mate, went on board the Spanish vessel. The mate, however, remained on board the *Le Jonet* up to the time of the rendering of the salvage service, and until the vessel was placed in safety. The salving vessel, the *Colletis*, is an iron screw steamship, navigated by a crew of thirteen hands, and at the time of the collision in question, was on a voyage from Ghent to Hull. She sighted the

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Le Jonet at about 5.30 on the morning after the collision, and immediately went up to her. Some of the crew of the *Colletis*, went in their life-boat on board the *Le Jonet*, and found her in great distress, making water, and with her foretopmast and her jib-boom gone. There can be no doubt that she had been kept by the exertions of the mate from drifting like a log upon the water. She was in a condition of great peril, even having regard to the actual state of the weather at the time; and if the weather had changed for the worse there is great reason to doubt whether the vessel could have been saved at all. After clearing the wreck, the salvors took the *Le Jonet* in tow, and after towing her for about thirty-three hours, brought her safely to the port of Hull. In the first place, the salvors claim for a sum of 108*l.* 16*s.*, which was paid by them for pumping and other expenses incurred in dock at Hull. That sum must either be paid as part of the salvage reward or independently of that reward. It cannot be paid in both ways. I consider that it must be paid independently of salvage, and that it must be paid to the plaintiffs, as expenses, although, strictly speaking, it ought to have been defrayed by the marshal, Now it has appeared that there is in this case a salvor who is not, strictly speaking, before the Court. I intimated that this was the opinion of the Court upon the facts, as they appeared by the pleadings, and the evidence produced before me has greatly strengthened that opinion. I adhere, as Dr. Lushington did in *The Warrior* (1), to the doctrine laid down by Lord Stowell in *The Neptune* (2), that the crew of a salved vessel cannot, under ordinary circumstances, have a persona standi as salvors against their own vessel. That principle, I consider, should be maintained in its integrity, but the crew of a salved vessel may, by the acts of their master, be placed in such a position that the engagement they have entered into is at an end. Dr. Lushington, in *The Warrior*, said, "But there are two ways in which the contract of seamen may be dissolved. It may be dissolved by final abandonment of the ship, or by the act of the master giving the seamen a discharge." In this case, the master abandoned his vessel with all his crew, except the mate, who voluntarily stayed on board,

(1) Lush. 476. (2) 1 Hagg. Adm. 227.

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and the mate's contract with the master, to serve in that capacity, must be considered as at an end. There are two questions which I have to decide. Was the mate's contract at an end, and if it was at an end, and the mate stayed on board voluntarily, did he render salvage service? As to the first question, I decide in the affirmative, and as to the second, I think he did render salvage service, not only in working for the safety of the ship during the night of the collision, and in shewing a signal of distress on the morning after, but also in taking the helm after the crew of the *Colletis* came on board. This, I consider, was a very meritorious service indeed, and if the example of courage he set had been followed by the rest of the crew, it is probable there would have been no need of the salvage services of the crew of the *Colletis*. Although the mate is not technically before the Court, the owners of the *Le Jonet* have undertaken to give him such sum as I may award. It would be a great waste of money if another suit was instituted, and I shall therefore recommend that he should receive a certain sum. Bearing that in mind, I shall award salvage reward to the owners, masters, and crew of the *Colletis*, as the merits of the case deserve. To the *Colletis* I award 210*l*. I recommend that the owners give 40*l*. to the mate of the *Le Jonet*, making the total sum 250*l*. The expenses of pumping and other expenses paid by the salvors will be paid out of the fund in court, and I shall certify for costs, as I consider it was a proper case to be brought in this court.

Solicitors for plaintiffs: *Thomas Cooper*.
Solicitor for defendants: *Rothery & Co.*

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Salvage—Services rendered by one Vessel to another belonging to the same Owners.

A steam vessel laden with a general cargo became disabled at sea in consequence of her machinery breaking down. Her cargo had been shipped under bills of lading which contained among the excepted perils "accidents from machinery." Another steam vessel belonging to the same owners fell in with the disabled vessel and towed her into safety:—

Held, that the owners of the vessel rendering the service were entitled to recover salvage remuneration against the cargo laden on board the disabled vessel, and that the master and crew of the vessel rendering the service were entitled to recover salvage remuneration against the disabled vessel, her freight and cargo.

THIS was a consolidated cause of salvage carried on on behalf of the owners, master, and crew of the steamship *Roxana* against the cargo lately laden on board the steamship *Miranda* and the owners of the cargo, who were defendants intervening, and on behalf of the master and crew of the *Roxana* against the *Miranda*, and her freight.

From the statements in the pleadings the following facts appeared:—The *Miranda* was a screw steam vessel of 735 tons register, and was on a voyage from Patras to London with a cargo of dried fruit. When about from eighteen to twenty miles south-east of Cape St. Vincent it was found that the crank shaft of her engines was so nearly broken in two places that another turn or two of her propeller would have separated it. At this time the *Roxana*, a screw steam vessel of about 674 tons register, proceeding on a voyage from London to Genoa with a cargo of general merchandise, was in sight. The *Miranda* signalled to the *Roxana*, and the *Roxana* came up to the *Miranda*, took her in tow, and towed her into Gibraltar. The *Roxana* was occupied in towing the *Miranda* from about 6.30 P.M. on the 13th of October until 7 A.M. on the 17th. The weather was fine, and the towage was not attended with any danger; but the towing hawsers of the *Roxana* were damaged, and a considerable quantity of coal was consumed in effecting the service. The damage to the hawsers and the cost of the coal amounted to about 83*l*.

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The answer filed on behalf of the owners of the cargo of the *Miranda* contained the following allegations:—

3. The sole owners of the vessel *Miranda* are, and were at the time mentioned in the petition, the plaintiffs, the London Steamship Company, Limited; and the said plaintiffs are and were at the same time the sole owners also of the vessel *Roxana*.

4. The cargo laden on board the *Miranda* at the time mentioned in the petition was so laden by the several owners thereof, on the terms of certain contracts then entered into between them and the plaintiffs, the London Steamship Company, Limited, whereby the said plaintiffs contracted with the several owners of the said cargo to carry the said cargo to London for freight, to be by them earned on the usual terms. The act of the plaintiffs, the London Steamship Company, Limited, in towing the *Miranda* to Gibraltar, was done only in fulfilment of their contract to carry the said cargo to London as aforesaid, or for the purpose of enabling their own vessel to earn the freight on the said cargo, or for the sake of bringing their own vessel safe into port, and was in any case an act done for the sole behalf and advantage of the said plaintiffs, and was not, so far as the said plaintiffs are concerned, a salvage service.

5. The cargo laden on board the *Miranda* as aforesaid was so laden on the implied condition and warranty that the *Miranda* was stout, staunch, and strong, and well equipped and fitted, and in all respects seaworthy for the voyage; whereas, in fact, the crank shaft of the after-engine was not sufficiently strong, or there was some other improper fitting in the said after-engine, or otherwise the said implied warranty was not complied with. Wherefore, and for no other cause, the said crank shaft of the after-engine of the *Miranda* was broken, or nearly broken, as in Article 3 of the petition stated, and the *Miranda* came in need of and received the assistance of the *Roxana*, as in the said petition stated.

6. In the circumstances aforesaid the plaintiffs, the London Steamship Company, Limited, are not entitled to any salvage remuneration.

7. The defendants submit to pay such remuneration to the plaintiffs, the master and crew of the *Roxana*, for the services rendered by them as to this Court shall seem just and equitable; but they contend that such remuneration should in the circumstances be of small amount.

The reply was in substance as follows:—

1. The cargo laden on board the *Miranda* at the time mentioned in the petition had been laden on board her by the respective shippers thereof, under certain bills of lading which were in one or other of the three forms annexed hereto. No other contract had been entered into with respect to the carriage of the said cargo.

2. And as to the 5th Article of the said answer, the plaintiffs submit to the judgment of this honourable Court whether any such warranty as is alleged in such article was implied or existed, regard being had to the terms of the said bills of lading. The plaintiffs further say that at the time when the *Miranda* sailed from her respective ports of loading she was in all respects seaworthy for her intended voyage to London.

The first form annexed to the reply was so far as material in substance as follows:—

Shipped in good order and condition by in and upon the steamship called the *Miranda*, whereof Dilly is master for this present voyage, and now lying in the port of Zante, and bound for London, with liberty to call at any port or ports in the Mediterranean . . . . to sail with or without pilots, to tow and assist vessels in all situations, and to carry goods of all kinds being marked and numbered as per margin, and to be delivered from the ship's deck, where the ship's responsibility shall cease, in the like good order and condition, at the aforesaid port of London, or so near thereunto as she may safely get (the act of God, the Queen's enemies, pirates, robbers, thieves, restraint of princes and rulers, fire at sea or on shore, accidents of the seas, rivers and navigation, damage by vermin or from other goods by sweating or otherwise, barratry of master and mariners, damage or loss from collision, or from any act, neglect, or default of the pilot, master, or mariners in the navigation or management of the ship, accidents or damage from machinery, boilers and steam, of whatever nature or kind soever excepted), unto or to his or their assigns, he or they paying freight for the said goods, in cash free of interest, on ship's arrival, at the rate of . . . .

In witness . . . .

Dated in Zante this 22nd September, 1871.

The other forms were in substance the same, the only difference being in the words describing the excepted perils. The excepted perils mentioned in the second form were nearly the same as those mentioned in the first form, and included "accidents from machinery, boilers, steam, or any other accidents of the seas, rivers, and steam navigation of whatever nature or kind soever." The excepted perils mentioned in the third form were so far as material the same as those mentioned in the first form.

The defendants in their rejoinder denied all statements in the reply inconsistent with the statements in the answer.

It appeared, on the hearing of the cause, that the value of the *Miranda* was 15,000*l.*, the value of her cargo 18,775*l.*, and the value of her freight in course of being earned was 1875*l.* Evidence was given to shew that the *Miranda* was built, fitted, and rigged with a view to depending principally upon her steam power, and that in bad weather she was to a great extent unmanageable under canvas. It was proved that not long before the voyage during which her engines broke down she had been fitted

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with new boilers and her engines had been thoroughly overhauled, when no flaw could be detected in the shaft.

Butt, Q.C., and *E. C. Clarkson*, for the owners (1) of the *Roxana*. It is admitted that salvage is due to the master and crew of the salving vessel, and it is difficult to understand why the owners of the salving vessel should not also be entitled to salvage, because it is clear that if the services had been rendered by any other vessel the owners of the cargo would have been liable to pay salvage to the owners of that vessel. The owners of the *Roxana* were under no obligation to render services to the cargo on board the *Miranda*: *The Maria Jane* (2); *The Sappho*. (3)

[SIR ROBERT PHILLIMORE referred to the case of *The Le Jonet*. (4)]

Accidents caused by machinery are among the events which excuse the performance of the contract entered into on the part of the owners of the *Miranda*, so that her owners had no interest in saving the cargo from the danger to which it was exposed by the accident in question.

Milward, Q.C., and *W. G. F. Phillimore*, for the owners of cargo on board the *Miranda*. The owners of the *Roxana* in rendering assistance to the cargo were only employing their own resources for the purpose of performing their own contract and saving their own freight. The contract entered into by the plaintiffs as owners of the *Miranda* was a contract to carry the cargo safely, and the contract must be regarded as containing an implied warranty that the vessel was fit to carry the cargo safely, that it was in a seaworthy condition at the time of shipment: Abbott on Shipping, American ed. 1846, p. 417, n. 1; *Readhead* v. *Midland Ry. Co.* (5); *Putnam* v. *Wood*. (6) The mere circumstance that the shaft gave way at a time when there was nothing to account for it giving way is evidence that it must have been in a defective condition at the

(1) They also appeared for the master and crew of the *Roxana*.

(2) 14 Jur. 857.

(3) Ante, p. 142; Law Rep. 3 P. C. 690.

(4) Ante, p. 556.

(5) Law Rep. 2 Q. B. 412; in Ex. Ch. Law Rep. 4 Q. B. 379.

(6) 3 Mass. Rep. 481; and see *Stanton* v. *Richardson*, Law Rep. 7 C. P. 421.

time when the cargo was shipped: Arnould on Insurance, vol. ii. 627. If the owners of the *Miranda* neglected to provide a seaworthy vessel the exceptions in the charterparty have no application because the implied warranty of seaworthiness is a condition precedent to the exceptions becoming operative. Even if the exceptions are to be considered as operative, the accident in question is not within the excepted perils. Accidents from machinery mean accidents causing direct injury to the cargo: *Czech* v. *General Steam Navigation Co.* (1) The plaintiffs having put the cargo in jeopardy and saddled it with a salvage lien for the salvage due to the master and crew, ought not to be allowed to gain a profit by their own wrong.

Butt, Q.C., in reply. *Tarrabochia* v. *Hickie* (2) shews that a warranty of seaworthiness when expressed in a charterparty is not to be treated as a condition precedent. In the present case there is no such warranty, the only contract is the contract expressed in writing, and no terms can be added to that. There is no evidence whatever to shew that the *Miranda* was unseaworthy at the time the cargo was shipped; on the contrary, there is evidence to shew that she was seaworthy. If the owners of the cargo rest their case upon the alleged unseaworthiness of the *Miranda* at the time the cargo was shipped, the onus of proving such unseaworthiness rests with them.

SIR ROBERT PHILLIMORE. The facts not in controversy and material to mention are these: the *Miranda*, a screw steam vessel, having a valuable cargo on board, received salvage services from the *Roxana*. The *Miranda* was bound to London on a voyage from Patras, while the *Roxana* was proceeding on a voyage from London to Genoa. When the vessels were in sight of each other, and about eighteen or twenty miles to the south-east of Cape St. Vincent, the master of the *Miranda* signalled to the *Roxana*, and requested her assistance. The damage the *Miranda* had sustained was this: the crank shaft of her after-engine was so nearly broken that another turn or two of her propeller would have separated it. The *Miranda* wished to be towed back to Gibraltar, and she was accordingly taken in tow by the *Roxana*, and was towed into

(1) Law Rep. 3 C. P. 14. (2) 1 H. & N. 183; 26 L. J. (Ex.) 26.

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Gibraltar, the service beginning between six and seven o'clock on the evening of the 13th of October, and ending at about half-past eight on the morning of the 17th of October. The weather was fine at the time, and the service was performed without danger either to the *Roxana* or her crew; but apart from the peculiar circumstances to which I am about to advert the service was a service for which the Court would be disposed to award a considerable sum, the value of the property salved being high, that is, about 36,000*l.* The Court, however, cannot award, and indeed is not asked to award, any salvage remuneration to the owners of the *Roxana*, either on the value of the *Miranda* or on the value of her freight. But the master and crew can according to the decision of the *Sappho* (1)—a decision which has been affirmed on appeal by the Judicial Committee of the Privy Council—claim on the entire sum, that is, on the value of the *Miranda*, her cargo and freight.

The defences raised by the owners of the cargo of the *Miranda* to the claim preferred by the owners of the *Roxana* are the following:—First, that the owners of the *Roxana* were bound by their contract with the owners of the cargo laden on board the *Miranda* to carry the cargo of the *Miranda* to London, and that they would not have fulfilled this contract unless they had rendered assistance to the *Miranda*, which assistance is to be considered as an act done for the sole benefit and advantage of the owners of the *Roxana*. Secondly, it was said that implied in the contract between the owners of the *Roxana* and the owners of the cargo of the *Miranda* there was a warranty of the seaworthiness of the *Miranda;* that the accident arose from the breach of such warranty; and that the owners of the *Roxana* therefore were liable for all the consequences of such breach, and so were not entitled to salvage remuneration for averting a loss which, if it had happened, would have fallen upon themselves.

It is replied to these defences that the contract is to be found in the bills of lading admitted to have been made between the parties.

If I am to decide the question whether the owners of the *Roxana* are entitled to salvage reward, I must first determine

(1) Ante, p. 142; Law Rep. 3 P. C. 690.

whether they are so entitled apart from the question of their being the owners of the vessel salved. I think unquestionably they rendered a salvage service entitling them to salvage remuneration, unless peculiar circumstances have rendered it impossible for them to recover that remuneration.

It becomes necessary, therefore, to decide the question of law. The contract set out in the bills of lading is that the *Miranda* should take her cargo on board, and deliver it at the port of London in the like good order and condition as shipped; then follow many exceptions which are to be considered as affording a justification for the non-performance of the contract, and among these exceptions is included one about which there has been much discussion. This exception, which is contained alike in all the bills of lading, though not always expressed in precisely the same words, is as follows: "Accidents from machinery."

If I had to determine the case upon the point raised with reference to the alleged implied warranty of seaworthiness, I should rule that the burthen of proving the breach of such warranty rests with the defendants, and that sufficient evidence as to the vessel's state, and the state of her machinery, has not been given to lead the Court to find that she was in an unseaworthy condition at the time the cargo was shipped. But I think the true question in the case is,—Does not the exception, "accidents from machinery," include the present case? I think that I must come to the conclusion that the accident in question finds its place among the excepted perils; it is therefore unnecessary for me to discuss the able argument which has been addressed to the Court with respect to a warranty of seaworthiness being implied in the contract.

I have now to consider the amount of the sum to be awarded. I must remember that the *Miranda* was owned by the owners of the *Roxana*, and that the owners of the *Roxana* were earning freight for the carriage of the cargo of the *Miranda*, and that no material deviation from the voyage occurred to the *Roxana* as she towed the *Miranda* in the direction of the port to which she herself was bound. I must also bear in mind that the weather was fine, and that there was no danger.

Under the peculiar circumstances of the case I shall award to

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the owners of the *Roxana* 350*l.*, to be paid out of the proceeds of the cargo. Remembering that the ship was the principal agent in rendering the salvage service, I shall award to the master and crew 120*l.*, to be paid out of the proceeds of the ship, freight, and cargo. (1)

Solicitors for plaintiffs: *Hillyer, Fenwick, & Stibbard.*
Solicitors for defendants: *Waltons, Bubb, & Walton.*

July 16.

CARGO EX ARGOS.
THE HEWSONS.

Jurisdiction of County Courts in Admiralty Causes—The County Courts Admiralty Jurisdiction Act, 1869 (32 & 33 *Vict. c.* 51), *s.* 2—*Claim arising out of an Agreement made in Relation to the Use or Hire of any Ship, or to the Carriage of Goods in any Ship.*

The Court of Common Pleas having decided in *Simpson* v. *Blues* (Law Rep. 7 C. P. 290), that the County Courts Admiralty Jurisdiction Act, 1869, s. 2, does not extend the Admiralty jurisdiction of the county courts to any matters in respect of which this Court does not possess jurisdiction, this Court, though disapproving of that decision, *held*, that it was bound to follow it.

CARGO EX ARGOS.

THIS was an appeal from the City of London Court.

The suit was instituted in the City of London Court for freight, demurrage, and expenses on behalf of the owner of the steamship *Argos* against 147 barrels of petroleum lately shipped on board the said steamship, owner or owners unknown, in the sum of 200*l.* An appearance was entered on behalf of Walter Horner Brown. The suit came on to be heard before Mr. Commissioner Kerr, when a statement of agreed facts, signed by the solicitors for the plaintiff and the solicitors for the defendant, was filed in court. It is unnecessary to set out the facts further than to shew the nature of the claim. The barrels of petroleum were shipped on board the plaintiff's ship in London, to be delivered at Havre. The plaintiff's

(1) The judge was asked to apportion the sum of 120*l.*, and he apportioned it as follows: 70*l.* to the master, and the residue to the crew according to their rating.

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ship arrived at Havre on the 7th of December, with the petroleum and a general cargo of other goods. The authorities at Havre, in consequence of the large quantity of war material at that time on the quay there, refused to allow the petroleum to be landed. The *Argos*, therefore, after attempting unsuccessfully to obtain leave from the authorities to land the petroleum at other ports near Havre, transhipped the petroleum into a lighter in the outer harbour while she unloaded the rest of her cargo on the quay, and took in a fresh cargo for London. Afterwards she was obliged, by the port authorities at Havre, to reship the petroleum, and she carried it back to London. The plaintiff claimed freight for the carriage of the goods from London to Havre, and from Havre to London; he also claimed the expenses of transhipping the petroleum, and other expenses and damages for the detention of the *Argos*.

On the 15th of January, 1872, Mr. Commissioner Kerr gave judgment for the plaintiff for 135*l.* 5*s.* 8*d.*, the full amount claimed. Against this decision the defendant appealed, upon the ground that it was wrong in point of law. On the 16th of January the defendant and a surety entered into the following bail bond:—

Whereas a suit for freight, demurrage, and expenses has been instituted in this court on behalf of Jules Gaudet, of 73, Lower East Smithfield, owner of the steamship or vessel *Argos*, against 147 barrels of petroleum lately shipped on board the *Argos* by W. Horner, but now lying at Plaistow Wharf, Plaistow, in the county of Essex, owner or owners unknown. And whereas Walter Horner Brown, of No. 11, Billiter Square, in the city of London, merchant, has entered an appearance to this suit. Now, therefore, we, the said Walter Horner Brown and William George Blagden, of No. 15, Fish Street Hill, in the said city of London, commission merchant, jointly and severally submit ourselves to the jurisdiction of the said court, and consent that if he, the said Walter Horner Brown, shall not pay what may be adjudged against him in the said suit, with costs, execution may issue forth against us, and each of us, our heirs, executors, and administrators, our goods and chattels, for a sum not exceeding one hundred and fifty pounds.

On the 7th of May, 1872, the appeal came on for hearing, and was fully argued on the merits by counsel for the appellant and respondent, no objection being taken to the jurisdiction, and judgment was reserved. Afterwards, and before any judgment was pronounced, the Court stated that, in consequence of the decision of the Court of Common Pleas in the case of *Simpson* v.

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Blues (1), it desired to have the question whether the Court had jurisdiction to entertain the suit argued. Accordingly, on the 11th of June, the question of jurisdiction was argued.

Milward, Q.C., Day, Q.C., and *G. Bruce,* for the respondent, in support of the jurisdiction.

The Admiralty Advocate, Dr. Deane, Q.C., and *Murphy,* for the appellant, against the jurisdiction.

Milward, Q.C., in reply.

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THIS was an appeal from the County Court of Durham. The suit was instituted against the owner or owners of the ship *Hewsons* to recover damages for breach of a charterparty. The plaintiffs alleged that one of them on behalf of himself and the other of them entered into a charterparty for the use or hire of the ship *Hewsons* for successive voyages from Hartlepool to the Elbe until the 31st of October, 1870; and although four of such voyages were performed, the said ship afterwards refused to carry out such charter, whereby they sustained damage. An appearance was entered on behalf of the owners of the *Hewsons;* and at the hearing of the cause in the county court, they objected that the court had no jurisdiction to try the cause. The cause was, however, heard on its merits, and judgment was given for the plaintiffs. Against this judgment the defendants appealed. The Court having intimated that it desired to have the question of jurisdiction alone argued in the first instance, the cause came on for argument on this question, together with the *Cargo ex Argos,* on the 11th of June; the argument was continued on the 25th of June.

E. C. Clarkson, and *Gibson,* for the appellants, argued against the jurisdiction.

Cohen, and *W. G. F. Phillimore,* for the respondents, argued for the jurisdiction.

Clarkson, in reply.

Cur. adv. vult.

(1) Law Rep. 7 C. P. 290.

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CARGO EX ARGOS.
THE HEWSONS.

July 16. SIR ROBERT PHILLIMORE. The case of the *Cargo ex Argos* is an appeal from the City of London Court.

The case of the *Hewsons* is an appeal from the County Court of Durham.

In both these cases the same question of law arises, namely, the true construction of the 2nd section of 32 & 33 Vict. c. 51. The words are these:—"Any county court appointed, &c., shall have jurisdiction, and all powers and authorities relating thereto, to try and determine the following causes:—First, As to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship, and also as to any claim in tort, in respect of goods carried in any ship, provided the amount claimed does not exceed 300*l.*"

In order to put a due construction on this section, the 31 & 32 Vict. c. 71, as well as that of 32 & 33 Vict. c. 51, must be read together, for it is expressly enacted by the latter statute, that the two Acts "are to be read and interpreted as one Act."

The title of the former statute is "An Act for conferring Admiralty Jurisdiction on the County Courts." The title of the latter statute is "An Act to amend the County Courts (Admiralty Jurisdiction) Act, 1868, and to give jurisdiction in certain maritime causes."

What jurisdiction did this Act give? Some jurisdiction, it must be answered, not already possessed. It is necessary, therefore, first, to inquire what jurisdiction did the county courts already possess relatively to the subject of the present suit.

Section 3, clause 2 (31 & 32 Vict. c. 71) conferred jurisdiction —"As to any claim for damage to cargo or damage by collision; any cause in which the amount claimed did not exceed 300*l.*"

The same pecuniary limit is maintained whatever additional jurisdiction is given in the last Act. In the present causes I am concerned only with the damage to cargo, but it is not immaterial to observe that the damage done to ships is confined, in the first Act, to one cause, namely, damage by collision, while the last Act by section 4 enacts that, "The third section of the County Courts Admiralty Jurisdiction Act, 1868, shall extend and apply to all claims for damage to ships, whether by collision or otherwise, when the amount claimed does not exceed 300*l.*"

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In this matter of damage to ships, therefore, the jurisdiction of the county courts is indefinitely enlarged as to the cause of the damage, while the pecuniary limitation is expressly continued, as to the amount of the damage.

This observation is in aid of the contention, that not only a new jurisdiction is given to the county court, but a jurisdiction which is not possessed by the High Court of Admiralty. For the same object I notice the use, in this statute, of the broader term "Maritime," in lieu of the narrow term "Admiralty," as applied to the jurisdiction, and also what appears to me the significant introduction for the first time of mercantile assessors, expressly in addition to the merely nautical assessors appointed by the former County Court Act.

It has been ingeniously argued, on the other hand, that the first County Court Act gave no jurisdiction as to delay in delivery of the cargo, but merely as to damage of the goods. But then the second Act supplies this deficiency, and thereby, for the first time, made the jurisdiction of the county courts co-extensive with that of the Admiralty Court.

It is not and could not be denied that the language which it is said confers for the first time this jurisdiction on the county court, is totally different from that which confers the same jurisdiction on the Admiralty Court (24 Vict. c. 10, s. 6). I am unable to assent to this argument as to the construction of the statutes.

Section 3 of 31 & 32 Vict. c. 71, throughout uses the epithet "any," "any salvage, any wages," that is, "any," whether originally inherent on the Court, or conferred by statute.

I think that the words, "any damage to cargo," must be considered as used in their technical sense, and as conveying to the county courts the whole jurisdiction given to the Admiralty Court by the 6th section of the Admiralty Court Act. Moreover, if the second County Court Act was needed to supply this alleged deficiency in the first, the words, "any agreement made in relation to the use or hire of any ship," are very greatly wider than the supply of any such deficiency required.

The more I have considered this case, the stronger has been my opinion that the legislature both intended to convey, and did convey in plain language, a jurisdiction to the county courts which

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the Admiralty Court did not originally possess, while it gave an appeal nevertheless to that Court.

As I observed in a former case, it would not be for the first time that such a result had been effected deliberately by statute. Not long ago, the Admiralty Court had appellate jurisdiction in revenue cases from the Colonial Admiralty Courts, as to which it had no original jurisdiction (1). Moreover, I think that in conferring from time to time new jurisdiction upon the county courts, the legislature had not in view so much, if at all, the character of the subject-matter as the pecuniary amount which was at stake in the litigation. It appears to me to have acted more and more in each successive statute upon the principle (with the soundness of which I have nothing to do) that all commercial or civil transactions within a certain amount should be subjected to the jurisdiction of these local tribunals.

This is my opinion; but am I at liberty to act upon it? The Court of Common Pleas has very deliberately, and after hearing arguments, come to an opposite conclusion: *Simpson* v. *Blues* (2).

They say, "the words of the section, read apart from the context, are undoubtedly large enough to create a new jurisdiction in respect of a claim as for a breach of charterparty;" but they were of opinion from the context that the general intention was only to distribute the existing Admiralty jurisdiction by allowing suits of a limited amount to be instituted in inferior courts; and they appear to have been affected by the fact that upon any other construction the Admiralty Court would have appellate where it had not original jurisdiction, and they state other reasons relating to the inconvenience which they think would result from this jurisdiction being given to the county courts.

It seems to me, indeed, that the practical result of this judgment must be that the last County Court Act was altogether superfluous —at least I do not find in the judgment any such attempt as has been made in argument before me, to shew that the new Act was necessary to confer some jurisdiction which the Admiralty Court possessed, but which was not conferred on the county court by the previous statute, nor any attempt to satisfy the words of the new

(1) See *The Fabius*, 2 Rob. 245, 248. (2) Law Rep. 7 C. P. 290.

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statute, otherwise than by their relation to a new jurisdiction over a new subject-matter.

It has been argued that this judgment is not binding upon me, because, unlike the usual cases of prohibition, there is no appeal from it. But, after much consideration, I am satisfied that I ought not, in the matter of the construction of a statute, to make a decision which would be in direct conflict with that of a full court in Westminster Hall.

The Judicial Committee of the Privy Council may think themselves justified in pursuing a different course, and having regard to the principles laid down by me in *The Samuel Laing* (1), I shall grant an appeal to that court, but I shall dismiss both these suits without costs.

THE CARGO EX ARGOS.

Solicitors for appellant: *Heather, Son, & Gill.*

Solicitors for respondent: *Cattarns, Jehu, & Cattarns.*

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Solicitors for appellants: *Clarkson & Greenwell.*

Proctors for respondents: *Dyke & Stokes.*

July 31.

THE ALEXANDRIA.

Jurisdiction to entertain a Suit in Personam—Liability of Pilot to be sued for Damages arising from Collision—County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71, *s.* 3)—*County Courts Admiralty Jurisdiction Act Amendment Act*, 1869 (32 & 33 *Vict. c.* 51, *s.* 3.)

2 P.D. 165

A ship by compulsion of law in charge of a duly licensed pilot in the river Mersey came into collision with and occasioned damage to another vessel. The owners of the damaged vessel instituted an Admiralty suit in the Court of Passage against the pilot:—

Held, on appeal affirming the decision of the Assessor of the Court of Passage, that the Court of Passage had not jurisdiction to entertain the suit, as an Admiralty suit.

Semble, the Court of Admiralty has not jurisdiction to entertain such a suit.

THIS was an appeal from the Court of Passage of the borough of Liverpool. The cause was a cause of damage instituted on

(1) Ante, p. 284.

behalf of the Oceanic Steam Navigation Company, Limited, against Owen Jones, pilot. The collision in respect of which the suit was brought, took place between the *Atlantic*, a vessel of the plaintiffs, and the *Alexandria*, in the river Mersey. The *Alexandria* was by compulsion of law in charge of a duly licensed pilot. The defendant was the duly licensed pilot so in charge of her. It was admitted for the purposes of the case that it is not usual for the Mersey pilots to enter into a bond, such as is required to be entered into by the Trinity House pilots by the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, s. 372, and that the defendant had not entered into any such bond.

A motion was made on behalf of the defendant before the Assessor of the Court of Passage to dismiss the suit, on the ground that the Court of Passage had no jurisdiction to entertain a claim in personam for damage by collision against a person who was not the owner of the ship or vessel causing the damage. The learned Assessor granted the motion and dismissed the suit; but gave leave to the plaintiffs to appeal. (1)

(1) The following is the report of the judgment of the assessor, as printed for the purposes of the appeal:—

After stating the facts, the Assessor said that the question turned upon the construction of recent statutes to extend the jurisdiction and improve the practice and procedure of the High Court of Admiralty, for the Act which conferred Admiralty jurisdiction on this Court was not intended to give it a more extensive jurisdiction than the High Court possessed. The first provision which affected the question was the 6th section of the 3 & 4 Vict. c. 65, and he was of opinion that the construction of this section contended for by the defendant's counsel was correct, that it was intended only to remove the restriction imposed by the 13 Rich. 2, c. 5, forbidding the Admiralty Court "to meddle with anything done within the realm, but only things done upon the sea," and to give the Court cognizance of suits for damage when the damage was received on a navigable river within the body of a county, and the section did not enlarge the jurisdiction in any other respect. The question mainly depended on the 24 Vict. c. 10. The 7th section of that statute gave the Court of Admiralty jurisdiction over any claim for damage done by a ship. What was the meaning to be given to these words? On a consideration of the statute, and especially the 5th, 6th, and 11th sections, the only conclusion was that, in respect of such damage, the ship itself, and the owners, master, and persons identified in interest with the ship, were alone answerable in the Admiralty Court. The 35th section gave a choice of proceeding either against the ship or against persons, but only persons identified with the ship; and it was not applicable to a pilot who was on board by compulsion of law without the consent of the owner—a stranger who could not be identified with the ship. This view was strongly

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July 24. *G. Bruce*, for the appellants. This is undoubtedly a cause of damage by collision. It is, therefore, an Admiralty cause within the meaning of the County Courts Admiralty Jurisdiction Act (31 & 32 Vict. c. 71), and the legislature has expressly provided that in such causes the jurisdiction may be exercised by proceedings in rem, or by proceedings in personam. It is true it has been decided that the jurisdiction conferred upon the county courts by the recents Acts is not as regards the subject-matter more extensive than that possessed by this Court: *Everard* v. *Kendall* (1); but it by no means follows that the method of proceeding in the county court is limited by the rules of proceeding which prevail in this Court. The legislature has used words which plainly confer upon the county court jurisdiction to proceed in personam; it is, therefore, unnecessary to consider whether this Court has jurisdiction to proceed after the same method.

But assuming, for the sake of argument, that the words of the statute conferring upon the county court jurisdiction to proceed in personam are to be interpreted so as to confer upon a county court jurisdiction in personam in those cases only when this Court may proceed in personam, there is abundance of authority to shew that this Court may proceed in personam against the persons by whose default a collision has been occasioned: *The Volant* (2); *The Clara*. (3) It is an error to suppose that the existence of a maritime lien or right to proceed in rem is the foundation of the jurisdiction of the Court. There are many matters in respect of which this Court has undoubted jurisdiction where the proceedings are always in personam: *The Hope*. (4) In suits for distribution of salvage, for wearing illegal colours, and for assault on the high seas, the proceedings are always in personam: *The Ruckers*. (5) So this

confirmed by the 13th section of the Admiralty Court Act, 1854, which, in giving a jurisdiction in personam to the Court, limits such jurisdiction to proceedings against the owner of the ship. Moreover, the case of *The Urania* (10 W. R., p. 97) was a distinct authority in favour of this view. In that case, after the passing of the Admiralty Court Act, 1854, Dr. Lushington declined to issue a citation in personam against a pilot for damage done to a ship by the ship of which he was in charge by compulsion of law, on the ground that such jurisdiction was not given to the Court by the Act. The motion must therefore be allowed, and the suit dismissed. Leave to appeal was given.

(1) Law Rep. 5 C. P. 428.
(2) 1 W. Rob. 383.
(3) Swab. 3.
(4) 3 C. Rob. 215.
(5) 4 Rob. 73

Court has always held that a master of a ship binding himself by a bottomry bond is personally liable. It is a common thing in a case where damage has been done by a Queen's ship, and no action can be maintained against the ship, to sue the master. In modern times the mode of proceeding in rem has been largely resorted to, because of the great advantage it affords to suitors; but it is clear that anciently the jurisdiction of the Court was exercised principally by proceedings in personam. In fact, it was not until the decision in *The Bold Buccleuch* (1), in 1851, that the mode of proceeding in rem was fully recognized. In Clerke's Praxis hardly any mention is made of proceedings in rem, and with the exception of one or two articles the whole treatise is devoted to proceedings in personam. Title 28 of Clerke's Praxis shews that, according to the old practice the warrant was impetrated in rem only when the debtor was absent abroad or had absconded; Malyne's Lex Mercatoria (1686), p. 88.

Anciently this Court exercised jurisdiction in personam over pilots: Ord. of Hastings (temp. Ed. I.) printed in Hall's edition of Clerke's Praxis; An Addition to the Inquisition of Queenborow (temp. Ed. III.), Black Book, edited by Sir Travers Twiss, vol. i. p. 161; De Officio Admiralitatis, 26th article, Black Book, edited by Sir Travers Twiss, vol. i. p. 230. (2)

In the Admiralty Courts in America the origin and extent of the jurisdiction of the Court has been much discussed.

[SIR ROBERT PHILLIMORE referred to *De Lovio* v. *Boit.* (3)]

In *Manro* v. *Almeida* (4) a suit in personam was instituted against a defendant who had forcibly taken money of the plaintiff from on board a steamer on the high seas. The money was not within the jurisdiction of the Court. It was held that the suit could be maintained. Mr. Justice Johnson, in delivering judgment, said:—

The ground of complaint is a maritime tort, the violent seizure on the ocean of a sum of money, the property of the libellants. That the libellants would have

(1) 3 Wm. Rob. 220; 7 Moo. P. C. 267.

(2) See also the Appendix to Black Book, vol. i. p. 350, where are printed forms of mandate to the marshal; one form runs thus:—"Mandamus, quin attachies I. de K. civem per sex dolia vini .... quod sufficienter compareat sub pœna juris coram nobis, &c., ad Curiam Admiralitatis."

(3) 2 Gall. 398.

(4) 10 Wheaton, 473.

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been entitled to Admiralty process against the property if it had been brought within the reach of our process, no one has questioned. The only doubt on this part of the subject is, whether the remedy in pursuance for which this is a substitute (or more properly the form of instituting it), can be pursued in the Admiralty. On this point we consider it now too late to express a doubt. This Court has entertained such suits too often without hesitation, to permit the right now to be questioned.

In the case of the sloop *Merchant* (1), which was a joint bill filed by seamen against the vessel in rem, and against her master and owner in personam, to recover wages and moneys paid to the use of the vessel, Judge Betts, reviewing the history of the distinction between proceedings in rem and in personam, observed :—

The method of initiating suits in the English Admiralty by arrest of the vessel is declared to be of ancient use: *The Dundee* (2); but at what point of antiquity it became a remedy of the Court is not traceable from the printed decisions or rules. . . . There is certainly no clear authority shewing that actions in rem preceded those in personam as the general means of exercising the jurisdiction of the Court; far less is there any to prove that the latter class of actions derived their qualities from the processes or rules of pleading employed in the former. Each form of action is distinct and independent of the other in respect to the methods of procedure employed, and (with a few exceptions) in respect to jurisdiction over the subject-matter upon which they may act. Suits in rem and suits in personam are by no means convertible terms; and if in some instances they are concurrent, there are numerous cases in which one must be employed to the exclusion of the other.

Again, it has been held in America, in *Willard* v. *Dorr* (3), that although in that country a master cannot proceed in rem against his ship for wages as he has no lien, yet that for that purpose he may maintain a suit in the Admiralty Courts in personam against the owner. Mr. Justice Story in that case said :—

The judges of the common law seem to have been ignorant that a seaman could maintain a suit in personam in the Admiralty for wages (though that is now familiar) as well against the owner as master. In ancient times the principal mode of proceeding in the Admiralty was by process in personam. My opinion is, that the Admiralty has jurisdiction in cases of this nature in personam, though not in rem.

In *Brevoor* v. *The Fair American* (4) it is said in the course of the judgment :—

The right to proceed in rem does not exclude the remedy in personam, though

(1) 1 Abb. Adm. 1.
(2) 1 Hagg. Adm. at p. 124.
(3) 3 Mason, 91.
(4) 1 Pet. Ad. 87.

it is taken frequently in preference for the greater security: *Marshall* v. *Bazin* (1), cited in Abbott's American Digest, vol. i. (1867), p. 46: *The Boston.* (2)

H. Bremner, for the respondent. If the jurisdiction does not belong to this Court, the cases of *Simpson* v. *Blues* (3), followed by this Court in *The Cargo ex Argos, The Hewsons* (ante, p. 568), are express decisions that it is not conferred by the County Courts Admiralty Jurisdiction Acts on the Court of Passage. It is for the appellants, who allege the jurisdiction, to establish its existence. If it exists, it belongs to the Court by virtue of its original jurisdiction as inherent in its constitution, or it has been conferred by statute.

Cases have been referred to on the other side, chiefly from American reports, in which a jurisdiction in personam is claimed for Admiralty Courts, but there does not appear in them anything to shew that it was ever exercised over other than masters or owners, persons subject to the maritime law, and identified in interest with the ship. This Court seems to have claimed a general jurisdiction over masters of ships, though, except in the case of Queen's ships, which rest on special grounds, there are no cases reported in which a suit in personam in a cause of damage has been brought against a master. In *The Sylph* (4), all the cases are reviewed.

In a suit for damage by a Queen's ship the proceeding is against the commander, on whose behalf the Lords of the Admiralty direct the Admiralty Proctor to enter an appearance, but the submission to the jurisdiction of the Court is voluntary: *The Athol* (5); *The Volcano.* (6) Dr. Lushington, in *The Volant* (7), states that the maritime law which this Court administers regards the owner of a vessel doing damage as bound to make good the loss to the owner of the other vessel, and then specifies three methods by which the obligation is enforced in the Admiralty Court by a proceeding in personam against the owner or against the master, or by a proceeding in rem against the ship. But the learned judge does not refer to any case in which the proceeding in personam against the master or owner in a cause of damage had been resorted to.

(1) 7 N. Y. Legal Observer, 392.
(2) 1 Sumn. 329, 341.
(3) Law Rep. 7 C. P. 290.
(4) Law Rep. 2 A. & E. 24.
(5) 1 Wm. Rob. 374.
(6) 2 Wm. Rob. 337.
(7) 1 Wm. Rob. 383.

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In *The Trelawney*, reported in a note to *The Hope* (1), a suit in personam in a cause of salvage was, after argument and upon consideration, allowed against the owner. In that case the vessel was not within the jurisdiction, and the salvors would otherwise have been without remedy. This case was followed in *The Meg Merrilies* (2); *The Rapid*. (3) The maritime law regards the owner of a vessel only as liable to pay for the damage done by his ship, and each of the three methods of procedure has for its object to enforce payment by him, the proceeding against the master being against one who is his recognized agent in all matters connected with the ship.

As the proceeding in rem against the ship afforded the most efficient remedy, the proceeding in personam in the Admiralty Court never seems to have been resorted to in a cause of damage, as redress in that form would naturally be sought in a court of common law, and the jurisdiction had become obsolete or so doubtful that it was deemed necessary to insert an express provision in the Admiralty Court Act, 1854 (17 & 18 Vict. c. 78), to confer a right to proceed in personam in the Admiralty Court against the owner in all cases in which a right of action existed against the property.

It has been alleged on the other side that the Court having jurisdiction over the subject-matter of damage, must have jurisdiction to enforce a claim for damage against the person whose wrongful act occasioned the damage. This proposition seems to assume that the jurisdiction of a Court over persons depends upon its jurisdiction over the subject-matter, and is based on an erroneous assumption as to the province of a Court, for a Court can only enforce obligations which are imposed by the system of law it administers. The maritime law requires owners to pay for the damage done by their ships, and the Court of Admiralty compels payment by the owner, but it cannot, because it entertains a suit for damage, acquire a jurisdiction to make a pilot pay, when the maritime law does not regard a pilot as liable.

It is, however, contended that if the Court does not possess the jurisdiction claimed as original, it has been conferred by the operation of ss. 7 and 35 of the Admiralty Court Act, 1861 (24 Vict. c. 10). The argument on these sections is, that this being a claim

(1) 3 Rob. at p. 216 n. (2) 3 Hagg. Adm. 346. (3) 3 Hagg. Adm. 419.

for damage done by a ship, the Court has jurisdiction over it by the 7th section, and by the 35th section this jurisdiction may be exercised by proceedings in personam. This construction, however, does not regard the object of the enactment. Before the Act a ship and her owner were only responsible in the Admiralty Court for damage done by the ship when the damage was done to a ship: *The Bilbao.* (1) It was obviously unreasonable that the liability of a ship for damage done by it should be so limited, and the 7th section removed the limitation and allowed a suit to be maintained against a ship in any case of damage. That this was the operation of the section is shewn by several cases: *The Malvina* (2); *The Uhla* (reported in a note to *The Sylph*) (3); *The Clara Killam* (4); *The Excelsior* (5); *The Minna.* (6) In all these cases the proceeding was in rem against the ship, and they clearly indicate the effect of the section which gives to the owner of any property to which damage is done by a ship the same remedies in the Admiralty Court against the ship and her owner as before the Act belonged only to the owner of a ship receiving such damage. The section was not intended to alter the remedies or procedure of the Court of Admiralty, but only to apply them to claims for damage which before the Act the Court could not entertain. Still less can it be said that the section has the effect of creating an entirely novel remedy of giving to the owner of a ship receiving damage in a collision a right to proceed in personam against a pilot in charge of the other ship.

A section of an Act enlarging the subject-matter of the jurisdiction of a Court cannot be construed to give the Court jurisdiction over a class of persons not before subject to it. If such were the intention of the legislature, it would have been expressed in clear and intelligible terms: *Smith* v. *Brown.* (7) There is no indication in any part of the Act of an intention of the legislature to enlarge the jurisdiction of the Court over persons.

But, independently of argument, *The Urania* (8) is a decision of this Court expressly negativing the existence of the jurisdiction contended for.

(1) Lush. 149.
(2) Lush. 493; 31 L. J. (P. M. & A.) 113.
(3) Law Rep. 2 A. & E. at p. 29.
(4) Ante, p. 161.
(5) Law Rep. 2 A. & E. 268.
(6) Law Rep. 2 A. & E. 97.
(7) Law Rep. 6 Q. B. 729.
(8) 10 W. R. 97.

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Lastly, the jurisdiction claimed is not called for by any considerations of necessity or expediency. The plaintiffs' claim is founded on negligence producing damage. For such a wrong the plaintiffs have their remedy by an action at law, and a suit in the Admiralty Court is neither a more effective nor a more convenient remedy. If this suit were allowed to proceed, the defendant would be deprived of his right of trial by jury, and might be called upon to pay damages which he could not be made responsible for in an action at law.

Bruce, in reply. The case of *The Urania* (1) is not in point. The defendant in the case was a Trinity House pilot; the liability of Trinity House pilots is regulated by the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 373. They can only be sued upon the bond which the statute requires them to enter into; so that in *The Urania* (1) the Court was really asked to sanction a suit to enforce a bond. It has always been held that this Court has no authority to enforce a contract under seal made on land: *Howe* v. *Nappier* (2); *The Carolus*. (3) Dr. Lushington refused to entertain the suit simply because he considered he had not jurisdiction to enforce the bond.

Cur. adv. vult.

July 31. SIR ROBERT PHILLIMORE. This is an appeal from the Court of Passage at Liverpool. The question raised is, whether that Court, exercising Admiralty jurisdiction, had power to entertain a suit brought by the owner of a ship which had been injured by collision on the high seas, against the pilot in charge of the wrongdoing vessel at the time of the collision. The Court below held that it had not power to entertain such a suit.

The contrary position was argued before me with considerable learning and ability by Mr. Bruce, and I think it right to state that if the question were res integra I should be of opinion that under the provision contained in ss. 7 and 35 of 24 Vict. c. 10, the Court had jurisdiction in this suit; but it appears to me that this very question was distinctly raised before my predecessor who, in *The Urania* (1), apparently without doubt, decided the contrary. The case, I must observe, is reported by Dr. Tristram, the counsel who argued it. In these circumstances, in the absence

(1) 10 W. R. 97. (2) 4 Burr. 1944. (3) 3 Hagg. Adm. 343, n.

of any precedent, and remembering that the plaintiff has a remedy at common law, it would, I think, be wrong in me to reverse this judgment; but in accordance with the principles laid down in *The Samuel Laing* (1), I will give leave to appeal to the Privy Council. I dismiss the suit with costs.

Solicitors for appellants: *Wood & Tinkler.*
Solicitors for respondent: *Bremner & Son.*

THE SAN ROMAN.

June 25.

Delay in the Prosecution of a Voyage justified by risk of Capture by Enemies' Cruisers—Queen's Enemies—Restraints of Princes and Rulers—Terms of Bill of Lading modified by the Terms of Charterparty.

A charterparty was entered into between an English firm and a Hamburg firm, the owners of the *R.*, a vessel belonging to Hamburg. The charterparty provided that the vessel should proceed to a foreign port and there load a cargo, and therewith proceed to a port within certain limits mentioned—the act of God, the Queen's enemies, restraint of princes and rulers, and dangers of the seas excepted. It was provided that the master should sign bills of lading as required, but at not less than the chartered rate, without prejudice to the charterparty. The plaintiffs, with full knowledge of the terms of this charterparty, shipped a cargo at the port of loading under bills of lading by which it was provided that the goods should be delivered at a port within the limits mentioned in the charterparty as ordered, the dangers of the seas only excepted. After the making of the charterparty, and the shipment of the goods, war broke out between the North German Confederation and France. The ship on her homeward voyage sustained damage at sea, and was compelled to put into a neutral port for necessary repairs, and there finding that French cruisers were in the vicinity, she remained for a long time after the necessary repairs were completed, in order to avoid the risk of capture. The risk of capture was such as to render it reasonable and prudent for the master, having regard to the preservation of his ship, to remain in port. On the departure of the cruisers the master sailed on his voyage, and delivered the cargo according to orders, at an English port within the limits mentioned in the charterparty. In a suit brought by the plaintiffs to recover damages for the delay incurred in order to avoid risk of capture:—

Held, that the delay was justifiable.

Semble, that the single exception of dangers of the seas mentioned in the bill of lading did not, under the circumstances, exclude the other exceptions mentioned in the charterparty.

THIS was a cause instituted under the 6th section of the Admiralty Court Act, 1861, on behalf of James Anderson, James George

(1) Ante, p. 284.

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Skelton Anderson, Alexander Gavin Anderson, and William Richard Anderson, trading under the style or firm of Anderson, Anderson, & Co., as merchants, at No. 1, Billiter Court, Fenchurch Street, in the city of London, against the vessel *San Roman*, and the freight due for the transportation of the cargo now or lately laden therein, and against the defendants Carl Heinrich Willink, Christian August Wilhelm Schon, and Gustav Adolph Schon, all of Hamburg, shipowners, the owners of the said ship *San Roman*, intervening.

The *San Roman* was a vessel belonging to Hamburg, an independent city of the North German Confederation, and her owners were subjects of the North German Confederation, and carried on business at Hamburg as Schon & Co. These facts were known to the plaintiffs, when early in 1869 they entered into correspondence at London with a broker at Hamburg of the name of Sloman, with reference to chartering the *San Roman*. Sloman acted for Schon & Co. The result of the correspondence between the plaintiff and Sloman was that the *San Roman* was chartered by Thomas Bilbe & Co. Thomas Bilbe & Co. were an English firm. In 1869 two of the plaintiffs were members of the firm of Thomas Bilbe & Co., and since December, 1869, until the commencement of the suit, all the plaintiffs were interested in the results of the operations of the firm of Thomas Bilbe & Co.

Two copies of the charterparty were executed.

One copy was expressed to be made on the 13th of February, between Schon & Co., owners of the *San Roman* and Thomas Bilbe & Co., charterers. It was signed "Aug. Jos. Schon, as owner." "Thomas Bilbe & Co., 26th February, 1869." This was set forth by the plaintiffs in their petition as the charterparty. There was evidence to shew that Schon signed this copy at Hamburg.

The other copy, bearing date the 13th of February, 1869, was expressed to be made between Anderson, Thompson, & Co., (1) for owners, and Thomas Bilbe & Co., charterers, and was signed "by authority by telegraph from R. M. Sloman, of Hamburg,

(1) It appeared from answers to interrogatories administered to the plaintiffs that in February, 1869, two of the plaintiffs were partners in the firm of Anderson, Thompson, & Co.

"Anderson, Thompson & Co.," as agents. "Thomas Bilbe & Co. 13/2/69." 1872

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The two copies were, as regards their terms, almost identical. The terms were in substance as follows:—

That the ship being warranted to be at Antwerp, and every way fitted for the voyage, should, after discharging outward cargo, for owners' benefit, with all convenient speed proceed to a safe landing place in Puget Sound or Burrard's Inlet, as ordered in Royal Roads off Victoria, V.I., or so near thereunto as she might safely get, and there load, as supplied by the agents of the said charterers, a full and complete cargo of spars, $\frac{\text{and}}{\text{or}}$ other lawful merchandise which the said charterers bound themselves to supply, and being so loaded should therewith proceed as charterers' agents might order on signing bills of lading, either to a port of discharge direct, within the limits hereinafter mentioned, or to Queenstown or Falmouth (1), for orders for a port of discharge, within the limits or so near thereunto as she might safely get, and should there deliver the cargo on being paid freight at the following rates per load of fifty cubic feet English customs calliper measurement.

	If ordered from Port of Loading.	If ordered from Queenstown or Falmouth.
A Port in the United Kingdom	95/	100/
A Port on the Continent, from Bordeaux to Hamburg, both inclusive	100/	105/
A Port in the Baltic	110/	115/

In full of all primage, port charges, and pilotages as customary. The freight to be paid on final and right delivery of the cargo, one half in cash, and one half by good and approved bills on London, at three months from same date. The charterparty then proceeded as follows:—

The ship to be consigned to and reported by charterers or their agents at the various ports under this charter, paying one consignment commission of two and a half per cent. on the gross freight. The master to sign bills of lading for the cargo as required by charterers or their agents, but at not less than the above

(1) In the charterparty signed by Anderson, Thompson, & Co., Cadiz was mentioned as one of the ports of call.

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chartered rate, without prejudice to this charterparty. The cargo to be brought to and taken from alongside the ship free of risk and expense to the ship.

The vessel to be discharged with all dispatch, in such safe dock or place in the port of discharge as charterers may order.

(The act of God, the queen's enemies, restraints of princes and rulers, frost, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, during the said voyage, always mutually excepted).

Forty-five working days are to be allowed the said charterers for supplying the said cargo, and for detention at port of call, besides forty-eight hours for waiting for orders there. The charterers to have the option of keeping the said ship fifteen days on demurrage, over and above the said laying days, @ 4*d.* p. reg. ton per day.

The master and owners to have an absolute lien on the cargo for the recovery and payment as above of all freight, dead freight, and demurrage.

It is hereby understood and agreed, anything in this agreement to the contrary notwithstanding, that the charterers and [or] their agents have power to advance on account of freight any money that they or their agents may consider necessary to relieve the ship from arrest, or generally, to prevent delay in the dispatch or due delivery at the port of discharge of the cargo; and the master's receipt for any money so advanced shall be conclusive and binding proof thereof, and of the necessity and propriety of the same, and the charterers shall be entitled to deduct the same from the freight at settlement, with interest at 7½ per cent. per annum, and 5 per cent. commission and cost of insurance. All contributions to general average losses which may become payable in respect of any advances under this charter, shall be borne and paid by the owners, and if advanced and paid by the charterers may be similarly treated by them as a payment on account of freight.

Pursuant to the terms of the charterparty the ship proceeded to Port Ludlow, and there Messrs. Sproat & Co., who were the agents of the plaintiffs, caused to be shipped on board of her a cargo of spars. The master of the ship signed a bill of lading for the spars. The bill of lading was in substance as follows:—

Shipped in good order and condition by Sproat & Co., as agents, on board the ship called the *San Roman*, whereof R. Martens is master, now lying at Port Ludlow, bound for Queenstown or Falmouth, for orders for a port of discharge.

[Spars, &c., describing the same.]

And are to be delivered in like order and condition, at a port within the limits mentioned in charterparty, as may be ordered at Queenstown or Falmouth (the dangers of the seas only excepted), unto Messrs. Anderson, Anderson, & Co., or to their assigns, he, or they, paying freight for the said cargo, as per charterparty, with average accustomed as per charterparty.

In witness whereof the master of the said vessel hath affirmed to three bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void.

Dated at Port Ludlow, the 21st day of May, eighteen hundred and seventy.

At the time the cargo was shipped Sproat & Co. had in their possession a copy of the charterparty which had been sent out to them by the plaintiffs. The goods mentioned in the bill of lading belonged to the plaintiffs. The bill of lading was afterwards delivered by Sproat & Co. to the plaintiffs.

The *San Roman* sailed from Port Ludlow on the 24th of May, 1870, with the said cargo on board, but damage sustained at sea constrained her to put into Valparaiso on the 26th of August, 1870. The necessary repairs were completed on the 23rd of September, 1870, when the ship was ready for sea, but a war between the North German Confederation and France, which had broken out in July, 1870, was then existing, and the fear of capture by French cruisers induced the master of the ship to keep her in port at Valparaiso until the 15th of December. In the meantime the master had incurred expenses at Valparaiso which he was unable to pay and a delay of some days occurred in consequence of his having to obtain a loan on bottomry and having to submit certain average papers to agents at Valparaiso. On the 23rd of December the *San Roman* proceeded on her voyage, and on the 16th day of April, 1871, she arrived at Queenstown and received orders to proceed to the Tyne. On the 25th day of April she arrived in the Tyne, and shortly afterwards finished the discharge of her cargo.

The plaintiffs in their petition alleged as follows:—

5. The *San Roman* sailed from Port Ludlow with the said cargo on board, but her master, in violation of the terms of the said bill of lading, without any justifiable cause, deviated from the said agreed voyage, by putting, with the said vessel and cargo, into Valparaiso, and by for a long time remaining there, though not prevented by the said excepted dangers from prosecuting the said voyage to the port of Queenstown or Falmouth, according to the terms of the said bill of lading.

6. By reason of the premises the plaintiffs have incurred great loss on account of their being for a long time deprived of the said cargo, and have also been put to great expense in and about endeavouring to obtain possession of the same, and the said cargo has been greatly deteriorated and depreciated in value, and the plaintiffs have been otherwise greatly damnified and injured.

The answer of the defendants contained, inter alia, the following allegations:—

4. A bill of lading of the said cargo, in the words and figures set out in article 3 of the petition, with a certain specification endorsed, was signed and delivered by R. Martens, who was then master of the *San Roman;* the said master had not any authority from the defendants to sign a bill of lading in the said terms or not

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containing the exceptions contained in the said charterparty, and the defendants never ratified his act in so doing.

5. On the 24th day of May, 1870, the *San Roman*, with the said cargo on board, sailed from Port Ludlow, and after putting into Mazatlan, in Mexico, on the 22nd day of June, in order to land the said R. Martens, who was dangerously ill, proceeded upon her voyage under the command of E. Hacke—who succeeded the said R. Martins in the command of the said ship—until the 8th day of August, when it was discovered that serious injuries had been sustained by the rudder and rudder trunk of the said vessel from the gales and heavy seas which she encountered, being dangers of the seas within the intent of the said bill of lading, and thereby it became and was necessary for the safety of the ship and cargo to put into a port of refuge to repair the said damage, and the master of the *San Roman*, as was reasonable and prudent for him to do, and as he lawfully might and ought to have done, steered for Valparaiso as the nearest safe port, and arrived there on the 26th day of August, 1870. It is wholly untrue as alleged in the 5th article of the petition that the master of the said vessel, in violation of the terms of the said bill of lading, and without any justifiable cause, deviated from the said voyage by putting into Valparaiso.

6. Subsequently to the sailing of the *San Roman* from Port Ludlow, as aforesaid, and before her arrival at Valparaiso, war broke out and was declared between the Empire of France and the States of the said Confederation, and such war continued until and was existing at the time of the arrival of the said vessel at Valparaiso, and thence until and at the time of the departure of the said vessel from Valparaiso, as hereinafter mentioned. By reason of such war the *San Roman* became and was liable to risk of capture. Upon the arrival of the *San Roman* at Valparaiso the said E. Hacke received for the first time information of the said war.

7. The said E. Hacke immediately upon his arrival at Valparaiso caused proper surveys to be made of the said damage, and the repairs found necessary were proceeded with and completed with all reasonable dispatch, and on or about the 23rd day of September the said repairs were completed, and the vessel was ready for sea.

8. From the time when the *San Roman* put into Valparaiso, and thence until the completion of the said repairs, and until the 12th day of December, 1870, French armed national cruisers were off the port of Valparaiso, and lying in the said port in readiness at any time to proceed to sea under sail or steam with the intention of capturing North German ships, and if the *San Roman* had during the time and under the circumstances aforesaid left Valparaiso, and attempted to proceed upon her voyage, she would almost certainly have been captured by some or one of the said cruisers, and there was no reasonable expectation that she would have escaped such capture.

9. On or about the 12th day of December, 1870, the last of the said French cruisers left Valparaiso and the offing, and the master of the *San Roman* immediately proceeded to make, with all reasonable despatch, the necessary preparations for proceeding upon his voyage, and on the 23rd day of the said month the said preparations were completed, and a reasonable and proper time having then elapsed since the said cruisers had sailed, so that it appeared that they were not in the neighbourhood of the port of Valparaiso, or intending to return thereto,

the *San Roman* on the said 23rd day of December got under weigh and proceeded upon her voyage. It is wholly untrue, as alleged in the 5th article of the petition, that the master of the said vessel, in violation of the terms of the said bill of lading, and without justifiable cause, remained a long time in Valparaiso; on the contrary, the master of the *San Roman*, as soon as the aforesaid repairs were completed, was always ready and willing to proceed on the said voyage as soon as it was reasonable and prudent so to do, regard being had to the said liability to risk of capture.

11. By the law of the said city of Hamburg, and of the said North German Confederation, the master of the *San Roman* was entitled to keep the said vessel in Valparaiso whilst she would have been liable to risk of capture at sea by reason of the said war; and by such law the master of the said vessel whilst the said war and liability to risk of capture continued was not under any obligation to the plaintiffs to proceed or to attempt to proceed upon the said voyage with the *San Roman;* and by the said law the master of the said vessel has not been guilty of any breach of contract or duty with or to the plaintiffs by remaining in Valparaiso with the said cargo under the circumstances hereinbefore stated.

12. It is not the fact that the said cargo was deteriorated or depreciated by the said delay or otherwise, as alleged in article 6th of the petition, and the several allegations contained in the said article are untrue.

13. The said delay of the said vessel at Valparaiso, and the damages, if any, resulting to the said cargo and to the plaintiffs therefrom, were caused by the act of God, the Queen's enemies, restraints of princes and rulers, and dangers and accidents of the seas, within the true intent and meaning of the said charterparty and bill of lading.

14. By the law of Hamburg and of the said Confederation, the defendants are not liable to the plaintiffs in respect of any deterioration of the said cargo or losses of the plaintiffs, arising from the prolongation of the said voyage owing to the said war, and liability to risk of capture.

May 30. The cause came on for hearing and was continued on the 31st of May and the 3rd and 4th of June. The depositions of witnesses examined at Valparaiso under a commission, with documents annexed, were put in, and witnesses were examined orally before the Court. The evidence was principally directed to the issue raised by the eighth article of the answer. The result of the evidence on this point appears from the judgment. On behalf of the defendants, Dr. Julius Seebohm, a North German advocate, who had for many years practised in the courts of law at Hamburg, and had devoted particular attention to the study of mercantile law, was examined as to the German law affecting the questions raised in the case. He gave evidence to prove that according to North German law, assuming goods to be shipped under a bill of lading, such as the bill of lading in the

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present case, and that bill of lading to be the only contract between the shipowner and the owner of the goods, and the North German Confederation to be afterwards to be involved in war, it would be the duty of the master to avoid risk of capture, not only for the sake of the ship, but also for the sake of the goods, even though the goods should belong to neutral owners, and that the master would be justified in delaying the vessel and cargo in order to avoid capture, provided the risk of capture were a risk to which, in the judgment of a sensible man, it would be imprudent to expose the ship or goods.

He referred to the following articles of the North German Code, which he stated had been in force in Hamburg since 1866: 504, 505, 607, 631, 634, 636, 637, 642, 643, 644, 645, 653, 708, 735, 824, 827, 852, 853. (1) He also referred to two cases decided in the Chief Commercial Court at Hamburg—the case of *The Guttenburg* and the case of *The Landwursten.* (2)

Butt, Q.C., and *Cohen*, for the plaintiffs. The first question is whether English or German law is to be applied in this case. The intention of the parties must be regarded, and the following facts plainly shew that it was intended that English law should govern. The charterers are English. The plaintiffs are English. The charterparty and the bill of lading are in the English language. The ports of call mentioned in the bill of lading are English. The measurement of the cargo is English measurement. The freight is stated to be payable in English currency. The enemies mentioned in the charterparty are the Queen's enemies. But whether English or German law applies, the substantial question remains the same, namely, Was the delay at Valparaiso such as a reasonable man would have incurred under the circumstances? The evidence shews it was not. They cited *The Patria* (3); *The Heinrich* (4); *The Teutonia* (5); *Pole* v. *Cetcovich.* (6) The *San*

(1) A translation of the North German Mercantile Code is contained in "Papers on Maritime Legislation." E. E. Wendt, 2nd ed.: London, 1871. Several of the articles referred to are printed in the report of *The Patria*, ante, p. 448.

(2) "Commercial Court Gazette," Hamburg, 25 Nov. 1871.

(3) Ante, pp. 436.

(4) Ante, p. 424.

(5) Ante, p. 394, at p. 415; Law Rep. 4 P. C. p. 171, at p. 179.

(6) 9 C. B. (N.S.) 430; 30 L. J. (C.P.) 102.

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Roman was entitled to a start of twenty-four hours, and she might easily have evaded the French cruisers.

Milward, Q.C., and *E. C. Clarkson*, for the defendants. The German law applies. The ship was German, her owners were German. The ship was in a foreign port when the charterparty was made; one copy of the charterparty was signed in Germany by the owners of the ship; and the port of discharge, according to the limits mentioned in the charterparty, need not have been English: *Lloyd* v. *Guibert* (1); *The Karnak* (2); *The Patria* (3). Assuming German law to apply, the facts proved clearly justify the delay, and shew that the master was bound to remain at Valparaiso.

If the case is to be governed by the English law, still it is contended that the delay of the master was justifiable: *The Wilhelm Schmidt.* (4) The delay was justifiable under general principles; but even if not so, it was justifiable by virtue of the terms of the charterparty. At the time the bill of lading was signed, all the parties had notice of the terms of the charterparty, and, under the circumstances, the charterparty, which contains the exception "Queen's enemies," was the controlling instrument: Parsons on Shipping, vol. i. p. 287, ed. 1869; *Sandeman* v. *Scurr.* (5) The rule of twenty-four hours' start would not apply, under any circumstances, to prevent a cruiser outside the port of Valparaiso giving immediate chase to the *San Roman;* and though the rule would apply to a cruiser in the port of Valparaiso, there is nothing to shew that the authorities there would have enforced the observance of the rule.

Butt, Q.C., in reply.

Cur. adv. vult.

June 25th. SIR ROBERT PHILLIMORE. This is a suit instituted under the 6th section of the Admiralty Court Act, 1861, by certain persons, as owners and consignees of the cargo, against the ship *San Roman*, a foreign vessel, for a breach of contract or duty in respect of the carriage of that cargo.

(1) Law Rep. 1 Q. B. 115.
(2) Law Rep. 2 P. C. 505.
(3) Ante, pp. 436, at p. 462.
(4) 1 Asp.'s Mar. Law Cases, p. 82.
(5) Law Rep. 2 Q. B. 86.

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The charterparty, dated the 13th of February, 1869, was made between the owners of the ship and certain English merchants and charterers, by which it was agreed in substance that the vessel, taking an outward cargo from Wales to Japan, should proceed to Vancouver's Island and load a cargo of spars, and therewith proceed as charterers' agents might order, on signing bills of lading, either to a port of discharge direct, within the limits thereinafter mentioned, or to Queenstown or Falmouth, for orders for a port of discharge within those limits. The master was to sign bills of lading without prejudice to the charterparty. The excepted perils were, "The act of God, the Queen's enemies, restraints of princes and rulers," and others.

The bill of lading which the plaintiff pleads as being pursuant to the terms of the charterparty, was dated the 21st of May, 1870. It referred to the charterparty, but contained only one excepted peril, "the dangers of the seas." The plaintiffs charge that the contract was violated by deviation from the voyage, and by a delay not caused by the excepted dangers.

There has been in this case, as in the former cases growing out of the French and German war, a contention as to what law governs the rights of the parties.

In this case the ship was German, but the charterers were English, and the charterparty, dated at London, was executed while she lay in the port of Antwerp, at Hamburg and in England, in the English language. The bill of lading was in the same language, dated and delivered at Port Ludlow, in Vancouver's Island. The only material difference between the two instruments for the purposes of this suit is, that the charterparty contains amongst its exceptions "the Queen's enemies" and "restraints of princes and rulers," while in the bill of lading the language is, "the dangers of the seas only excepted;" but then, this instrument refers to the charterparty, and the charterparty provided that the master might "sign bills of lading for the cargo as required by charterers or their agents, but at not less than the above chartered rate, without prejudice to this charterparty." I am of opinion that the contract is contained in both these instruments, but that the stipulation of the single exception in the latter does not supersede the stipulation as to the other exceptions stated

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in the former instruments. The port of call for orders and the port fixed for delivery were English.

With respect to the law applicable to these circumstances, I must observe that this is not a case in which the master would be contravening the law of his country by carrying the goods to their destination, but is a case in which, so far as that law is concerned, he might do so.

The question as to the reasonableness of the delay with reference to the excepted peril seems to me, as in the case of *The Wilhelm Schmidt* (1), to be properly governed by the law of the place of performance; and this also appears to be the principle on which the Court at Hamburg decided the case of *The Landwursten.* (2) It has been argued that these opinions conflict with the decision in *Lloyd* v. *Guibert.* (3) It is not, however, necessary to decide this point, or whether the case of *Lloyd* v. *Guibert* (3) be reconcilable with the decision of the Privy Council in *The Hamburg* (4), because I agree with Mr. Butt, that upon this question of the reasonableness of delay there is really no substantial difference between the law of England and Germany. According to both, an apprehension of capture, founded upon circumstances calculated to affect the mind of a master of ordinary courage, judgment, and experience, would justify delay.

I must not omit to notice one argument addressed to me upon the hypothesis that this case is governed by the law of the flag—German law. That law, it is said, entitles the owner to charge a portion of the expenses incident to the delay on the principle of general average upon the shipper, and so the master is exposed to a strong temptation to remain in port during a war of this kind, certain on the one hand that the loss will only partially affect his employers, and on the other hand, that he will be the gainer by being employed a longer time, because if he reached the port of destination his employment would be at an end till the war was over.

I am not insensible to the force of this argument, but the only just effect of it must be to render the Court vigilant in ascertaining

(1) 1 Asp.'s Mar. Cases, 82.

(2) "Commercial Court Gazette," Hamburg, 25 Nov. 1871.

(3) Law Rep. 1 Q. B. 115.

(4) 2 Moo. P. C. (N.S.) 289; Br. & L. 253.

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the character of the danger and the bonâ fides of the excuse. I must also bear in mind that the German law in this case does not, as was proved to me in this case, as also in that of *The Patria* (1), forbid the master to run the risk of capture in fulfilling his engagements.

The *San Roman* sailed to Port Ludlow, there loaded a cargo of spars, and proceeded on her voyage to Queenstown. Damage sustained at sea constrained her to put into Valparaiso on the 26th of August. In the petition of the plaintiffs this putting into Valparaiso was charged as a breach of contract, but this charge, at the hearing, was abandoned, and the allegation of breach of contract is confined to the subsequent remaining at that port. She did not leave it before the 23rd of December. The necessary repairs were completed on the 23rd of September, when the ship was ready for sea.

It is the delay during this interval of time, namely, from the 23rd of September to the 23rd of December, which the plaintiffs now allege as a breach of contract.

The delay is admitted. The defence set up is, that it was caused by the danger of capture from French cruisers, which rendered it unsafe to leave Valparaiso, and which brought the delay within the exceptions in the charterparty as to the "Queen's enemies."

It is admitted that there was a danger of the kind stated, but it is contended that it was not of the degree which warranted this long postponement of the execution of the contract. It was not of that pressing and imminent character which alone would justify such a delay. It was a danger rather in the nature of other perils by sea which it is the duty of the master to encounter.

The material evidence as to the delay appears to be as follows :—

On the 2nd of September the correspondents of the plaintiff's and consignees of the ship wrote this letter :—

"Per steamer viâ Panama and Southampton,
"Valparaiso, 2nd September, 1870.

"Messrs. Thos. Bilbe & Co., London.

"Gentlemen—At the request of Capt. E. Hacke commanding the North German ship *San Roman*, chartered by you, we beg to advise you that said

(1) Ante, p. 436.

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vessel has been obliged to put into this port in order to replace the rudder which has been broken at sea on her voyage to Europe.

"The repairs will be finished within a short time; but as Capt. E. Hacke has been warned by his consul not to proceed to sea as long as the vessels of his nation are exposed to capture by French men-of-war, he wishes to get instructions from you as to what to do in case of the war between Germany and France continuing at the receipt of the present.

"We shall be happy to be useful to you in the present, or in other matters, and remain,

"Gentlemen,
"Yours respectfully,
"L. Schutte & Co.

"Consignees of the North German ship *San Roman*,
Edward Hacke, master."

To this the following answer was written:—

"Messrs. L. Schutte & Co.
"Valparaiso.

"Per Messrs. Aug. Jos. Schon & Co.
"Hamburg,
"19th of October, 1870.

"Gentlemen—Messrs. Thomas Bilbe & Co. have asked us as their agents to reply to your favour of 2nd ulto., which reached them yesterday. We have first to point out to Capt. E. Hacke of the *San Roman*, that the mere dread of being captured is not a sufficient reason for his breaking the contract with the charterers, and while calling upon him as we now do to prosecute the voyage with all reasonable diligence, we have to give you notice that our principals will hold him or the owners of the ship liable for loss of market or other damages which they may sustain from the delay.

"Be kind enough to communicate this to Capt. Hacke.

"We are, &c.,
"Anderson, Anderson & Co.
"Agents to Messrs. Thos. Bilbe & Co.,
"Rotherhithe."

This answer, however, did not arrive at Valparaiso till after the 23rd of December, when the *San Roman* had sailed.

I must observe that in the letter of Messrs. Schutte there is, on the one hand, no suggestion that Captain Hacke was to blame or that his alleged reason for remaining in port was unsupported by fact, while on the other hand there is conclusive evidence that he was acting under the advice, indeed the admonition, of his consul, not to go to sea. And in the case of *The Teutonia* (1), the Privy Council in affirming my judgment, held that if a neutral merchant put his goods on board a belligerent ship, "it cannot be contended

(1) Law Rep. 4 P. C. 171, at p. 180.

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that the master is deprived of the right of taking reasonable and prudent steps for the preservation of his ship, because from the accident of the cargo not belonging to his own nation, the cargo is not exposed to the same danger as the ship."

The following facts are clearly proved: That a French man-of-war, a store ship, was always in the port; that there were several German ships in it, waiting there from the first days in August to the 15th of December, that during this period one only sailed, on the 5th of August, for Hamburg; that no German vessel left Valparaiso between the 18th of August and the 15th of December, that up to the 13th of November French men-of-war were in and out of the port, that after this time, according to the registers of the Commercial Exchange at Valparaiso, it was impossible to discover the destinations of the French ships, which "were kept strictly secret;" but that it appeared on that registry that they were cruising (*para cruzar*); that there had been captures made off Peru or Chili; that even after the 12th of December, French ships were reported to be in Peruvian waters; that after the news of the German victories arrived, the first German vessel left Valparaiso on the 15th of December.

I think it is also proved that between the 15th of December and the 23rd, when the *San Roman* left Valparaiso, the captain was guilty of no unnecessary delay with respect either to the bottomry bond, or to obtaining the average papers necessary for the protection of his employer, and that even then his crew at first refused to go to sea, through fear of capture.

It has been urged that in spite of the French cruisers, the *San Roman* having liberty of twenty-four hours' start, might have steamed out of the reach of the French cruisers. But the evidence satisfies me that this course would have exposed the ship to a very probable risk of capture. There were French cruisers without the port, and a stationary French store ship within; some communication was doubtless kept up between them—the evidence shews that the preparations of the *San Roman* to be ready for sea would in all probability have made known her intention, and the evidence as to the usual state of the wind off that coast does not in my judgment add any circumstance which would favour the escape from French cruisers, but the contrary.

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However this may be, I think the defendant has on the whole established his defence, that he only exercised his right of taking reasonable and prudent steps for the preservation of his ship, in refusing, under the advice of his consul, and in all the circumstances of the case, to sail before the 23rd of December, and I dismiss this suit with costs.

Solicitors for plaintiffs: *Thomas & Hollams.*
Solicitors for defendants: *Ingledew, Ince, & Greening.*

THE EXPRESS.

June 25.

Delay in order to avoid Risk of Capture—Refusal of Master to Tranship.

A charterparty, written in the English language, but entered into at Constantinople between freighters who were subjects of the North German Confederation, resident there, and the master of a North German vessel owned by subjects of the North German Confederation, provided that the vessel should proceed to Taganrog, and there take on board a cargo as therein mentioned, to be carried to Queenstown, Falmouth, or Plymouth for orders, and thence to a safe port in the United Kingdom, or a safe port on the Continent between Havre and Hamburg, both inclusive, or as near thereunto as he could safely get, and deliver the same on being paid freight as therein mentioned, the act of God, the Queen's enemies, restraint of princes and rulers, among other perils therein mentioned, excepted. In pursuance of the terms of the charterparty the vessel proceeded to Taganrog, and a cargo, as agreed, having been shipped on board, bills of lading were signed by the master of the vessel, under which the cargo was to be delivered at a safe port in the United Kingdom or on the Continent, as per charterparty, the act of God and the Queen's enemies excepted. On the 29th of June, 1870, the vessel sailed on her voyage with the cargo to Falmouth, one of the ports of call mentioned in the charterparty, and on the 16th of August put into Algesiras in order to obtain a supply of water. She there learnt, as the fact was, that since she had sailed from Taganrog a war had broken out between France and the North German Confederation, and was still existing. In order to avoid capture by the French cruisers the vessel proceeded to Gibraltar, where she arrived on the 15th of August, and remained there with her cargo on board till the 2nd of February, 1871, when, after receiving news that an armistice had been concluded between France and the North German Confederation, she sailed for Falmouth and delivered her cargo, according to orders, in London. Whilst the vessel was lying at Gibraltar her master was requested by the owners of cargo to proceed on his voyage, and if he would not do so, then to tranship and forward the cargo to its destination at the expense of his owners, but no tender of freight and expenses was made, such as according to German law was necessary to entitle the owners of the cargo to demand its transhipment. The war continued until January, 1871, and

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if the vessel had left Gibraltar during the war she would have run great risk of capture from French cruisers :—

Held, that under the circumstances the master was justified in proceeding with his ship to Gibraltar, and keeping her there with her cargo on board during the continuance of the war.

Semble, the law to be applied to the execution of the contract was North German law.

THIS was a cause instituted under the 6th section of the Admiralty Court Act, 1861, on behalf of Messrs. Scaramanga & Co., of London, owners and consignees of cargo laden on board the North German vessel *Express*, against the said vessel and her freight, and against her owners intervening as defendants.

The following are the material parts of the petition :—

1. The *Express* is a foreign vessel, of which no owner or part owner was at the time of the institution of this cause domiciled in England or Wales.

2. In or about the month of June, 1870, whilst the *Express* was lying in the port of Taganrog, the plaintiffs caused to be shipped on board of her a cargo of rye of the plaintiffs, and the master of the said vessel accepted the same to be carried in the said ship from Taganrog aforesaid to Queenstown, Falmouth, or Plymouth for orders, and thence to a port as ordered, under and according to the terms of a certain bill of lading duly signed and delivered by the said master, according to which bill of lading the said goods were to be delivered in the like good order and condition as they were shipped in, at a safe afloat port in the United Kingdom or on the Continent, as per a certain charterparty (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted) unto the plaintiffs of London, or to their assigns, paying freight, gratuity, and demurrage (if any) for the said goods, and other conditions as per charterparty.

3. The *Express* duly sailed on her said voyage with the said cargo on board, and in the course of the said voyage, without any justifiable cause or excuse, put into the port of Gibraltar. After the said vessel had so put into the said port of Gibraltar, and whilst she was lying there, her master was requested by the plaintiffs to proceed on the aforementioned voyage, and if he would not do so, then to tranship and forward the said cargo.

4. The said master, however, declined to comply with such request, and remained at Gibraltar with his said vessel and the said cargo on board of her for a very considerable time.

5. By reason of the premises the said master wrongfully and without justifiable cause, in violation of the terms of the said bill of lading, deviated from and delayed proceeding on the voyage in the said bill of lading mentioned.

6. The plaintiffs were and are the owners of the said cargo, and the holders of the said bill of lading.

7. By reason of the premises the said cargo became and was greatly heated, damaged, and depreciated, and the said cargo was delivered to the plaintiffs in a much worse order and condition than it was shipped in, this not being occasioned by any of the perils, causes, or matters in the said bill of lading excepted, and

thereby the plaintiffs have sustained great loss, and have been deprived of divers profits which they otherwise would have derived from the said cargo.

The proctors for the defendants, in their answer, alleged as follows:—

1. In the month of May, 1870, the *Express*, which then was and ever since has been, and still is, a vessel sailing under the flag of the North German Confederation, and belonging to the port of Rostock, in the Duchy of Mecklenburg, one of the States of the said Confederation, and owned by persons being subjects of the said Confederation, was lying in the port of Constantinople, and on the third day of the said month of May a charterparty was made and entered into between Wilhelm Fretwurst, the master of the *Express*, and Messrs. Schjott and Reppen, merchants, of Constantinople, and subjects of the said Confederation. By such charterparty it was agreed that the *Express*, under the German flag, should proceed to a loading place in the Azoff, as ordered at Berdianski, and there load from the factors of the freighter a full and complete cargo of tallow, wheat, Indian corn, seed, or other stowage goods at the option of the freighter; and being so loaded should therewith proceed to a safe port in the United Kingdom, or a safe port on the Continent between Havre and Hamburg, both inclusive, or so near thereunto as she might safely get, calling at Queenstown, Falmouth, or Plymouth, at the master's option, and deliver the said cargo on being paid freight, as therein mentioned, the act of God, the Queen's enemies, restraint of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, and navigation always excepted.

2. In pursuance of the terms of the said charterparty, the *Express* proceeded to Taganrog, which was the loading port in the sea of Azoff, for which she received orders at Berdianski, and the plaintiffs, who were the factors of the freighters within the meaning of the said charterparty, caused to be shipped upon the *Express*, at Taganrog, a cargo of rye in bulk, and the master of the *Express* signed and delivered to the plaintiffs a bill of lading in respect of the said cargo, in the words and figures following, that is to say:—

"Shipped in very good condition and order by Messrs. Scaramanga & Co., for account and risk of whom it may concern in and upon the good ship called the *Express*, North German flag, whereof is master for this present voyage Wm. Fretwurst and now riding at anchor in the port of Taganrog, and bound for Queenstown, Falmouth, or Plymouth, for orders, rye in bulk, say two thousand four hundred and ninety-seven chetwerts, being marked and numbered as in the margin, and are to be delivered in the like good order and well-conditioned at a safe afloat port in the United Kingdom, or on the Continent, as per charterparty (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted) unto Messrs. Scaramanga & Co., of London, or to their assigns, paying freight, gratuity, and demurrage (if any) for the said goods, and all other conditions as per charterparty stipulated in Constantinople the 3rd of May, 1870, with primage and average accustomed. In witness whereof the master or purser of the said ship hath affirmed to three bills of lading all of this tenor and date, the one of which three bills being accomplished, the other two to stand void.

"Dated in Taganrog, 15-27th June, 1870.

"Qualität und quantität unbekannt,
"Wm. Fretwurst.
} pp. Scaramanga & Co.
D. Manoussy."

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3. On the 29th day of June, 1870, the *Express* set sail from Taganrog with the said cargo, and proceeded on her voyage, and on the 16th day of August, 1870, cast anchor off Algesiras, with the intention of filling up her water casks, strong winds from the north-westward having for some days prevented, and still continuing to prevent, her from working through the Straits of Gibraltar.

4. After the sailing of the said ship from Taganrog, and before she anchored off Algesiras as aforesaid, war broke out and was declared between the Empire of France and the States of the said Confederation, and such war continued to exist down to and existed at the time when the *Express* anchored off Algesiras as aforesaid, and by reason of such war the *Express* became and was liable to risk of capture.

5. Upon arriving at Algesiras as aforesaid, the master of the *Express* was informed of the outbreak and existence of the said war, and learned that it would be dangerous for the *Express* to proceed upon her voyage, owing to the risk of her being captured by French cruisers at sea, and on the 18th day of August, 1870, the master of the *Express*, as he lawfully might do under and by virtue of the laws of Mecklenburg, and of the said Confederation, and as was reasonable and proper for him to do under the circumstances herein set forth, sailed with the *Express* from Algesiras, and proceeded to, and on the same day arrived in, the roadstead of Gibraltar, which was a safer and more sheltered roadstead than that of Algesiras. It is not the fact that the master of the *Express* without justifiable cause and excuse, or wrongfully or in violation of the terms of the said bill of lading, put into the port of Gibraltar, as alleged in the 3rd and 5th articles of the petition.

6. On the 30th day of January, 1871, the master of the *Express* received information that an armistice had been concluded between France and the said States of the North German Confederation, and thereupon immediately began to prepare the *Express* to proceed upon her voyage, and on the 2nd day of February, 1871, the news of an armistice having been confirmed, and the necessary preparations completed, the *Express* set sail from Gibraltar to complete her voyage.

7. From the time of the arrival of the *Express* at Algesiras, until the 30th day of January, 1871, the said war continued to exist, and during all such time, the *Express* would have been liable to risk of capture if she had attempted to proceed on her voyage, and during all such time French armed national cruisers were cruising off the Straits of Gibraltar, and in the Atlantic Ocean, and in the English Channel, and off the ports of Cork, Falmouth, and Plymouth, with the intention of capturing the *Express*, and other North German vessels; and if the *Express* had during the time aforesaid attempted to proceed on her voyage, she would almost certainly have been captured by some or one of such cruisers.

8. It is not the fact that the master of the *Express* unjustifiably, or in violation of the said bill of lading, delayed proceeding on his voyage as alleged in article 5 of the said petition. On the contrary, the said master was always ready and desirous to proceed from Gibraltar as soon as he could do so without being exposed to risk of capture.

9. By the law of the said North German Confederation, the master of the *Express* was entitled to keep her at Gibraltar whilst she would have been liable to risk of capture at sea by reason of the said war, and the said master was not, whilst the said war and liability to risk of capture continued, under any obligation to

attempt to proceed further upon his said voyage; and, by the said law, the master of the *Express* was not guilty of any breach of contract or duty with or to the plaintiffs in respect of his putting into Gibraltar or remaining there with the *Express* with the said cargo on board of her, or in respect of not transhipping the said cargo.

10. The master of the *Express* sailed from Gibraltar with the *Express*, within a reasonable and proper time after receiving notice of the termination of the risk of capture by reason of the said war.

11. On the 17th day of February, 1871, the *Express* arrived in Falmouth Harbour, and her master, having duly given notice of his arrival to the charterers' agents in London, on the 20th day of the said month received orders to proceed to London, and on the same day the *Express* left Falmouth, and on the 26th day of February, 1871, arrived in London.

12. On the 28th day of the said month of February, the discharge of the cargo was commenced; and on the 2nd day of March, 1871, such discharge was completed.

13. It is not the fact that the cargo of the *Express* was delivered in a worse order and condition than it was in when shipped.

14. If the said cargo was delivered in worse order and condition than it was when shipped, the deterioration was caused by the detention of the *Express* at Gibraltar, as hereinbefore mentioned, which is an exceptive peril within the true intent and meaning of the exception of "the Queen's enemies" contained in the said bill of lading, and by the natural condition and inherent vice of the said cargo, or by one of such cases.

15. Whilst the said vessel was detained at Algesiras and Gibraltar, as aforesaid, the master of the *Express* used all due and proper and reasonable care and skill in ventilating, trimming, and otherwise caring for the safety, order and condition of the said cargo, and did all things on his part to be done in taking care of the same, and any deterioration or depreciation of the said cargo was not caused by any neglect or default of the said master, but was caused by the detention of the said vessel as aforesaid, or by the natural condition and inherent vice of the said cargo, or by both of such causes, and by the law of the said North German Confederation, regard being had to the terms of the said bill of lading and charterparty, neither the *Express*, nor her owners, nor the said master, is or are liable to damages in respect of the depreciation or deterioration of the said cargo.

16. Save as herein appears, the defendants deny the truth of the several allegations contained in the said petition.

The plaintiff's solicitors in their reply pleaded that all the several averments, both as to law and as to fact in the answer, save such as were stated or admitted in the petition, were untrue; that all the several averments stated in the 5th, 7th, 8th, 9th, and 15th articles of the answer were immaterial and irrelevant; and that by the law of Mecklenburg and the North German Confederation the master of the *Express* was not justified in doing what was complained of in the petition.

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May 31. The cause came on for hearing; the hearing was continued on the 3rd, 4th, and 6th of June. Witnesses were examined orally before the Court on behalf of the plaintiffs and the defendants, and the depositions of witnesses examined under a commission at Gibraltar were put in. The allegations contained in the 1st, 2nd, 4th, and 6th articles of the petition, and in the 1st, 2nd, 3rd, 4th, 6th, 11th, and 12th articles of the answer were substantially proved. The following facts were also proved:—The master of the *Express* upon arriving at Algesiras was informed of the outbreak of the war, and received from the North German consul at Gibraltar, on the 18th of August, a letter which was in substance as follows:— (1)

> Having been informed that you have called in at Algesiras on account of want of water, and that you intend proceeding on your voyage, I have written to the vice-consul of that place that he should give you contrary advice on account of the existing war between France and Germany, as I consider that you would incur risk if you proceeded to sea, as it is said that the French men-of-war have captured amongst others the barques *Brilliant*, Captain Zeissig, and *Perle*, Captain Wallis. In our bay are lying at anchor several German vessels.

On the 18th of August the *Express* sailed for Gibraltar, and arrived there the same day. The war continued to exist until January, 1871, and the master of the *Express* remained at Gibraltar, with his vessel, and with the said cargo on board of her, until the 2nd of February, 1871, when he proceeded on his voyage as alleged in the 6th article of the answer. The agents of the plaintiffs at Gibraltar, shortly after the arrival of the *Express* at that port, requested the master of the *Express* to proceed on his voyage without delay, and on his refusing to do so protested against him for improperly delaying the voyage. Negotiations also took place with reference to the transhipment of the cargo into another vessel, in order that it might be forwarded to England. The result of the evidence with reference to these negotiations appears from the judgment.

It was proved that whilst the *Express* was lying at Gibraltar,

(1) This letter was tendered in evidence on behalf of the defendants, together with another letter to the master of the *Express*, from a German ship captain. The plaintiffs objected to the admission of the letters. The Court admitted the letter of the consul, as it was a communication from an official person, but refused to admit the other letter.

and during the month of August, 1870, and from that time up to the commencement of the armistice mentioned in the sixth article of the answer, French national vessels were cruising in the English Channel and elsewhere off the coast of England, and German vessels were exposed to risk of capture, though the evidence was conflicting as to the extent of the risk. The result of the evidence on this point appears from the judgment.

It was agreed that the evidence given in the cause of *The San Roman* (1) as to the German law should be admitted as evidence in this cause, but Dr. Seebohm, the expert examined in that case, was called on the part of the defendants as a witness in this case, and gave additional evidence, the substance of which is as follows:—

By German law the master of a German vessel laden with a neutral cargo and detained at a neutral port by a reasonable fear of capture, is justified in remaining there even in opposition to the expressed wish of the owner of the cargo. The owner of the cargo is entitled to demand and receive his cargo at the place of detention, provided he pays distance freight and such share of the expenses of detention as is properly chargeable against the cargo, but on no other terms.

The witness referred specially to the 634th article of the German Mercantile Code. The substance of this article is printed in the case of *The Patria*, ante, p. 449.

Butt, Q.C., and *Cohen*, for the plaintiffs. This case, in most of its circumstances, is analogous to the case of the *San Roman*, but differs from it in one point. The master of the *Express* received orders from the plaintiffs to proceed on his voyage, but he not only refused to do this, but declined to entertain any reasonable offer for the transhipment of the cargo. For the reasons stated in the argument in the *San Roman* it is contended English law is the law which must govern the contract; and according to English law the conduct of the master in detaining the cargo for so long a time, and refusing to enter into arrangements for its transhipment, was wholly unjustifiable. Nothing short of an actual operative restraint could excuse the delay: *Atkinson* v. *Ritchie*. (2) Even if German law is to be applied to the contract, the master was not justified in demanding more freight than distance freight, yet he refused to deliver up the cargo at Gibraltar, except upon payment of full freight.

(1) Ante, p. 583. (2) 10 East. 530.

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Milward, Q.C., and *E. C. Clarkson*, for the defendants. This case, equally with that of the *San Roman*, must be decided according to principles laid down by the law of Germany—the law of the flag. Not only is the ship German, but her master is a German, her charterers are Germans, and a portion of the bill of lading is in German. As to the alleged refusal of the master to receive distance freight, no offer as required by article 634 of the North German Mercantile Code was ever made to him, and until such offer was made he was not bound to deliver up the cargo.

Butt, Q.C., in reply.

Cur. adv. vult.

June 25th. SIR ROBERT PHILLIMORE:—This is a suit instituted under the 6th section of the Admiralty Court Act, 1861, by Messrs. Scaramanga & Co., merchants, owners of the cargo laden on board the *Express*, and holders of the bill of lading, against the foreign vessel *Express* for a breach of contract or duty in respect of the carriage of that cargo. In the month of May, 1870, a charterparty was entered into between the master of the *Express* and certain merchants of Constantinople. In pursuance of this charterparty the *Express* sailed to Taganrog, and took on board a cargo of rye upon the terms of a bill of lading which was as follows: [The learned judge here read the bill of lading.]

In this case the ship was German, her master was German, she was lying at Constantinople, her charterers were German, her charterparty was in English, the bill of lading was in English with a proviso in German. She took on board her cargo at Taganrog, her charterparty provided for a delivery at a safe port in the United Kingdom or on the Continent between Havre and Hamburg. Her port of call in fact was Falmouth.

I think in these circumstances the law to be applied to the execution of the contract is German; though in this, as in the case of the *San Roman*, with the exception of the question of transhipment, the principles of the English and of the German law would be pretty much the same. On the 30th of June, 1870, the *Express* sailed from Taganrog. On the 16th of August she anchored off Algesiras; there she was informed of the war which had broken out between France and Germany; 2nd, on the 18th of

August she arrived at Gibraltar. On the 30th of January, 1871, the news of the armistice reached her. On the 2nd of February she left Gibraltar. On the 17th she arrived at Falmouth; there she received orders to go to London, where she arrived on the 26th. On the 28th she began to discharge her cargo; and on the 2nd of March the discharge was completed. 1872 THE EXPRESS.

The questions to be determined by the Court are:—

1st. Whether the master was justified in putting into Gibraltar?

2nd. Whether he was justified in remaining there?

3rd. Whether he was bound to tranship and forward the cargo?

The burthen of proving the affirmative of the two first propositions, and the negative of the third lies upon the defendants.

I am of opinion that the fair result of the evidence is that the *Express* would have run great risk of capture, if she had left Gibraltar at an earlier period than she did leave it. I do not assent to the proposition that if the chances of capture and escape were equal the master was bound to proceed; but I think the former preponderated. It was contended that there must be what was called "an actual operative restraint." This would seem to indicate that nothing short of a blockade would justify the delay of the vessel to sail. I am not of this opinion. I think a reasonable prudent man, exercising due discretion and fortitude, would not have sailed, thereby exposing his ship to capture at that time. I am of opinion that the master was justified in putting into Gibraltar, and remaining there till the 2nd of February.

The question as to his duty to tranship remains to be considered. This is a duty which I may observe is set forth in the plaintiff's petition, but which only could arise under the German law. [The learned judge here read article 634 of the German Mercantile Code (1)]. The most important evidence upon this point appears to me to be contained in the correspondence between Messrs. Scaramanga & Co. and their agents Mosley & Co. at Gibraltar. The first letter is from Mosley & Co. on the 17th of August, in which they announce the arrival of the *Express* at Algesiras, and say that the writer has had an interview with the Prussian consul at Gibraltar who told him "that he was going to take upon himself to

(1) This article will be found printed in the case of *The Patria*, ante, p. 449.

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order the captain (through the Prussian vice-consul at Algesiras) not to proceed."

The answer to this is in these words: "In reply to this we beg to say that the captain is bound to proceed, but if he desires to tranship cargo at his risk and expense for the United Kingdom or Continent, for orders or for Amsterdam direct, we are willing to allow him to do so by first-class vessel or steamer." On the 26th Mosley & Co. write that the captain says, "he cannot proceed because there being at a short distance from this port French privateers, he would expose both the vessel and cargo: and that unless the whole freight was paid to him and under the due formalities with reference to his charterparty, he would not tranship cargo under so unfavourable conditions as proposed by you." On the 3rd of September they write that having remonstrated with the captain for asking whole freight he said he was prepared to make an equitable deduction, "200*l.* out of 750*l.*, but they said they had no authority to enter into any arrangement of this kind." On the 10th of September Scaramanga & Co. write, that if the captain would pay the charge of transhipping to Amsterdam or Rotterdam, "we should be disposed to accept Gibraltar as port of discharge, and pay balance of freight due to him."

On the 12th of September, the captain, through his agent, apprises Mosley & Co. that "he will resume his voyage so soon as he can do so in safety." On the 17th the cargo is surveyed, and declared to be in "a most excellent condition."

On the 24th, Mosley & Co. write that they cannot find a sailing vessel for the purpose of transhipment; they add: "We had an interview with the captain, and endeavoured to persuade him to accept what you propose. He told us the only thing he could do is to make a deduction of 125*l.* from the total freight," and added that he was more liberal than another German captain had been in the like circumstances.

On the 30th of September, Messrs. Scarmanga & Co. write that they are "not disposed to modify" their proposition. On the 21st of October the captain wrote to Mosley & Co. that the cargo was becoming "warm," and that he wished to know whether he was to take steps for preserving it, or whether they "would be inclined to tranship the cargo into another vessel here against a reasonable

reduction of freight." Mosley & Co replied that they had no other offer to make than that which they had already proposed. They informed Scaramanga & Co. that they had made this reply. On the 4th of November Scaramanga & Co. wrote that the captain's letters "did not call for any special reply, as he makes no definite proposal therein," and said that by making no offer themselves they would "probably be in a better position ultimately to deal with him for the loss arising out of his unwarrantable conduct in remaining in port." On the 24th of November they wrote that they should be willing to entertain any proposal emanating from the captain. On the 4th of February Mosley & Co. wrote that the captain had sailed; and on the 11th that "all the Germans that were lying here have now disappeared."

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I am of opinion that the only definite proposal made by Scaramanga & Co. to the captain was that he should tranship at his own cost and expenses; and that they were not authorized by the German code to make such a demand.

I therefore pronounce that the defence is successful, both upon the ground of the deviation and delay being caused by a reasonable apprehension of capture, and upon the ground that no legal demand in the sense of the article of the code for transhipment was made to the captain.

I dismiss the suit with costs.

Solicitors for plaintiffs: *Thomas & Hollams.*
Proctors for defendants: *Clarkson, Son, & Greewell.*

REGULÆ GENERALES.

REGULATIONS FOR PREVENTING COLLISIONS AT SEA.

ORDER IN COUNCIL respecting the application of Articles 11 and 13 of the Regulations as to two Ships meeting each other End On or nearly End On.

This Order appears in the "London Gazette" of the 4th August, 1868.

At the Court at *Osborne House, Isle of Wight*, the 30th day of *July*, 1868.

PRESENT:

The QUEEN'S most Excellent Majesty in Council.

WHEREAS by "The Merchant Shipping Act Amendment Act, 1862," it was enacted, that on and after the first day of June one thousand eight hundred and sixty-three, or such later day as might be fixed for the purpose by Order in Council, the regulations contained in the table marked C. in the schedule to the said Act should come into operation and be of the same force as if they were enacted in the body of the said Act; but that Her Majesty might from time to time, on the joint recommendation of the Admiralty and the Board of Trade, by Order in Council annul or modify any of the said regulations, or make new regulations in addition thereto or in substitution therefor, and that any alterations in or additions to such regulations made in manner aforesaid should be of the same force as the regulations in the said schedule: Sec. 25.

Sec. 58. And whereas by the same Act it was further provided that whenever it should be made to appear to Her Majesty that the Government of any foreign country is willing that the regulations for preventing collision contained in Table C. in the schedule to the said Act, or such other regulations for preventing collision as are for the time being in force under the said Act, should apply to the ships of such country when beyond the limits of British jurisdiction, Her Majesty might by Order in Council direct that such

Sec. 61. regulations shall apply to the ships of the said foreign country whether within British jurisdiction or not; and it was further provided by the said Act that whenever an Order in Council had been issued applying any regulation made by or in pursuance of the said Act to the ships of any foreign country, such ships should in all cases arising in any British Court be deemed to be subject to such regulation, and should for the purpose of such regulation be treated as if they were British ships:

And whereas by an Order in Council made in pursuance of the said recited Act, and dated the ninth day of January one thousand eight hundred and sixty-three, Her Majesty was pleased to direct:

First, that the regulations contained in the schedule to the said Act should be modified by the substitution for such regulations of certain regulations appended to the said Order;

Secondly, that the said regulations appended to the said Order should on and after the first day of June one thousand eight hundred and sixty-three apply to French ships whether within British jurisdiction or not:

And whereas by several Orders in Council subsequently made Her Majesty has been pleased to direct that the Regulations appended to the said Order of the ninth of January one thousand eight hundred and sixty-three shall apply to ships of the following countries, whether within British jurisdiction or not; that is to say,

Austria.	Chili.
Argentine Republic.	Denmark Proper.
Belgium.	Equator (Republic of the).
Brazil.	France.
Bremen.	Great Britain.

Greece.	Portugal.
Hamburg.	Prussia.
Hanover.	Roman States.
Hawaiian Islands.	Russia.
Hayti.	Schleswig.
Italy.	Spain.
Lubeck.	Sweden.
Mecklenburg-Schwerin.	Turkey.
Morocco.	United States, Sea-going Ships.
Netherlands.	United States, Inland Waters.
Norway.	Uruguay.
Oldenburg.	
Peru.	

And whereas Articles 11 & 13 of the said Regulations appended to the said recited Order of the ninth of January one thousand eight hundred and sixty-three are as follows; that is to say,

Article 11.—"If two sailing ships are meeting end on or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other."

Article 13.—"If two ships under steam are meeting end on or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other."

And whereas there has been doubt or misapprehension concerning the effect of the said two articles:

And whereas the Admiralty and the Board of Trade have jointly recommended to Her Majesty to make the following additions to the said regulations for the purpose of explaining the said recited articles, and of removing the said doubt and misapprehension:

Now, therefore, Her Majesty, by virtue of the powers vested in Her by the said recited Act, and by and with the advice of Her Privy Council, is pleased to make the following additions to the said regulations by way of explanation of the said two recited articles; that is to say,

The said two articles, numbered 11 and 13 respectively, only apply to cases where ships are meeting end on or nearly end on *in such a manner as to involve risk of collision.* They consequently

do not apply to two ships which must, if both keep on their respective courses, pass clear of each other.

The only cases in which the said two articles apply are when each of the two ships is end on or nearly end on to the other; in other words, to cases in which *by day* each ship sees the masts of the other in a line or nearly in a line with her own; and *by night* to cases in which each ship is in such a position as to see both the side lights of the other.

The said two articles do not apply *by day* to cases in which a ship sees another *ahead* crossing her own course; or *by night* to cases where the red light of one ship is opposed to the red light of the other; or where the green light of one ship is opposed to the green light of the other; or where a red light without a green light, or a green light without a red light, is seen ahead; or where both green and red lights are seen anywhere but ahead.

ADDITIONAL RULES FOR THE HIGH COURT OF ADMIRALTY OF ENGLAND. WITH FORM OF RELEASE.

Approved and Confirmed by the Queen in Council, 24th March, 1871.

At the Court at Windsor, the 24th day of March, 1871.

PRESENT:

The Queen's most Excellent Majesty in Council.

Whereas the Judge of the High Court of Admiralty has, in pursuance of the provisions of an Act passed in the Session of Parliament held in the third and fourth years of Her Majesty's Reign, intituled (cap. 65) "An Act to improve the Practice and extend the Jurisdiction of the High Court of Admiralty of England," made and submitted certain additional Rules for the said Court, together with a Form thereto annexed: And whereas the same have been this day laid before Her Majesty in Council:

Now, therefore, Her Majesty, having taken the said additional Rules and Form into consideration, was pleased, by and with the advice of Her Privy Council, to approve and confirm the same; and the said additional Rules and Form (a copy whereof is hereunto annexed) are hereby approved and confirmed accordingly. And Her Majesty was further pleased to direct that the said additional Rules and Form shall be additional Rules and Form for the said High Court of Admiralty accordingly.

Whereof the Judge, Registrar, and other Officers of the said Court, and all other persons whom it may concern, are to take notice and govern themselves accordingly.

(Signed) Arthur Helps.

The Right Honourable Sir Robert Joseph Phillimore, Knight, the Judge of the High Court of Admiralty of England, doth hereby, in pursuance of the provisions of an Act passed in the Session of Parliament held in the third and fourth years of Her Majesty's reign, intituled (cap. 65) "An Act to improve the Practice and extend the Jurisdiction of the High Court of Admiralty of England," and subject to the approval of Her Majesty in Council, make the following Rules for the said Court:—

I.

The following Rules of the Rules, Orders, and Regulations established by Her Majesty's Order in Council of the 29th of November, 1859, are hereby repealed, viz., Rules 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, and 26, 33 and 34.

II.

If the property to be arrested be situate within the Port of London, the Warrant shall be executed by the Marshal.

III.

If the property to be arrested be situate elsewhere than in the Port of London, the Warrant shall be executed either by the Marshal or by the Collector of the Customs for the district within which the property happens to be.

IV.

If within *twelve* days after service of a warrant or citation no appearance shall have been entered in the cause, the Proctor for the plaintiff may file his petition. And if within *twelve* days from the filing of the petition no appearance shall have been entered, the plaintiff's Proctor may, on bringing in his proofs, set the cause down for hearing.

V.

If, when the cause comes before the Judge, he is satisfied that the Plaintiff's claim is well founded, he may pronounce for the claim with or without a reference to the Registrar or to the Registrar assisted by merchants, and may at the same time order the property to be appraised and sold, with or without previous notice, and the proceeds to be paid into Court, or may make such Order in the premises as to him shall seem just.

VI.

The Forms annexed to the Rules, Orders, and Regulations established by Her Majesty's Order in Council of the 29th of November, 1859, and which are numbered as follows, are hereby repealed, viz., Forms Nos. 6, 7, 8, 9, 10, and 30; and the Form annexed to these additional Rules shall be substituted for Form No. 30.

VII.

These additional Rules shall come into operation on the 1st April, 1871, if the same shall have been previously approved by Her Majesty in Council, and if not, from the day on which they shall be so approved, and shall apply to all causes instituted on or after that date.

Robert J. Phillimore,
Judge of the High Court of Admiralty.

14th March, 1871.

Release.

In the High Court of Admiralty of England.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith. To the Marshal of the High Court of Our Admiralty of England, and to all and singular his Substitutes, Greeting. Whereas in a cause of instituted in Our said Court on behalf of against , We did command you to arrest the said and to keep the same under safe arrest until you should receive further orders from Us. Now We do hereby command you to release the said from the arrest effected by virtue of Our Warrant in the said cause, upon payment being made to you of all costs, charges, and expenses attending the care and custody of the property whilst under arrest in that cause.

Given at London, under the Seal of Our said Court, the day of in the year of our Lord One thousand eight hundred and

E. F.,
Registrar.

Release
Taken out by

IN THE HIGH COURT OF ADMIRALTY OF ENGLAND.

DIRECTIONS IN REGARD TO PRINTING THE PROCEEDINGS IN INSTANCE CAUSES.

Whereas by the 96th of the Rules, Orders, and Regulations for the High Court of Admiralty of England, which were confirmed by Her Majesty's Order in Council bearing date the 29th of November, 1859, it is ordered that, "in all contested causes the whole of the pleadings and written proofs on which the parties intend to rely at the hearing shall, unless the Judge shall otherwise order, be printed before the hearing; and the printing thereof shall be in such manner and form as the Judge shall from time to time direct:"

Now I, Robert Joseph Phillimore, Knight, Doctor of Laws, Judge of the High Court of Admiralty of England, do, in virtue of the powers vested in me, direct that in all causes in which the pleadings and written proofs are required to be printed, the manner and form of printing the same shall hereafter be as follows:—

I.

As to the printing of the preliminary Acts.

In a damage cause the preliminary acts shall be printed, either with the pleadings or proofs, or separately, as may be found most convenient.

II.

Mode of distinguishing the printed papers.

Words shall be printed in conspicuous type on the respective papers, to denote whether they are the "Pleadings," or the "Plaintiff's" or "Defendant's" Proofs, or their "Preliminary Acts."

III.

Style of printing.

The printing shall be in the form known as "demy quarto," and shall be in pica type.

IV.

The paper.

The paper on which the proceedings are printed shall be fine demy, weighing not less than twenty-one pounds per ream, and its size shall be such that each cut leaf of the folded sheet shall be eleven inches in height and eight inches and a half in width.

V.

No. of lines to a page.

The number of lines in each page of pica type shall be forty-seven, each line being five inches and three-quarters, or 146 millimetres, in length.

VI.

Charges for printing.

One hundred and fifty copies of the papers shall be printed, and the charges to be allowed on taxation for each sheet of eight pages shall be 44*s.*, to include inside marginal figures to every tenth line; and no extra charge shall be allowed for marginal notes.

VII.

Extra for table-work.

There shall be allowed for table-work the following additional charges:—

If in pica type	–	–	–	–	2*s.* 6*d.*	per page.
„ small pica	–	–	–	–	3 6	„
„ long primer	–	–	–	–	5 0	„

But in all cases where pica or small pica can be used for table-work an extra charge for smaller type shall not be allowed on taxation.

VIII.

Charge to include everything.

The prices mentioned above shall include all charges for printing, paper, folding, stitching, and cutting; and if a wrapper is required, it shall be charged for as a quarter sheet. No charge shall be allowed *on taxation* for corrections.

IX.

Spaces not to be left.

In printing any document which is divided into paragraphs, lines shall not be dropped, nor shall a space be left between the consecutive paragraphs; and if any such lines are dropped or spaces left, a deduction shall be made on taxation, as well in the printer's charges for printing as in the allowance to the proctors for correcting the press. In printing depositions the answer shall immediately follow the question, so that the question and answer together may form a single paragraph.

X.

As to material errors in the printing.

In case of any material error in the printing, or in case the printing shall not be done in the form and manner prescribed, either the parties shall be bound to reprint the proceedings, or a deduction shall be made on taxation from the cost of printing, and no allowance shall be made to the proctor by whom such printed papers are brought in for correcting the press.

XI.

Commencement of new mode of printing.

These directions shall apply to all cases in which the printing has not been begun prior to the 18th day of April, 1871.

Dated the 7th day of April, 1871.

Robert J. Phillimore,
Judge of the High Court of Admiralty.

ORDER IN COUNCIL.

At the Court at Osborne House, Isle of Wight, the 14th day of January, 1871,

PRESENT:

The QUEEN'S Most Excellent Majesty in Council.

Whereas there was this day read at the Board, a memorial from the Right Honourable the Lords Commissioners of the Admiralty, dated the 8th day of December, 1870, in the words following, viz.:—

Whereas by an Act passed in the last session of Your Majesty's Parliament, entitled "An Act for establishing a District Registrar of the High Court of Admiralty in England, at Liverpool," it was enacted that, "there shall be established in Liverpool a Registry of the High Court of Admiralty," and that it shall be lawful for Your Majesty, "from time to time, by Order in Council, to fix the limits of such Registry:" And whereas, having taken the advice of Your Majesty's Lord High Chancellor, we are of opinion that the limits of such Registry should be co-extensive with those of the district assigned by Your Majesty's Order in Council of the 14th day of January, 1869, to the County Court of Lancashire, as its district for Admiralty purposes; that is to say, to include the several districts of the County Court of Cheshire, holden at Chester, Birkenhead, and Runcorn, and of the County Court of Lancashire, holden at Warrington, St. Helen's, Liverpool, and Ormskirk, together with such parts of the sea adjacent to such districts to a distance of three miles from the shore thereof.

We humbly beg leave to recommend Your Majesty that you will be graciously pleased by your Order in Council to fix the limits of such Registry accordingly.

Her Majesty, having taken the said memorial into consideration, was pleased by and with the advice of Her Privy Council, to approve of what is therein proposed; and the Right Honourable the Lords Commissioners of the Admiralty are to give the necessary directions therein accordingly.

(Signed) ARTHUR HELPS.

GENERAL RULES AND ORDERS FRAMED UNDER THE "LIVERPOOL ADMIRALTY DISTRICT REGISTRARS ACT."

The Right Honourable Sir Robert Joseph Phillimore, Knight, Judge of the High Court of Admiralty, subject to the approval of Her Majesty's Treasury, doth hereby in pursuance of the Liverpool Admiralty District Registrars Act, 1870, and in pursuance and execution of all other powers enabling him in this behalf, make and publish the following General Orders, and doth direct as follows:—

I.

The Rules, Orders, and Regulations of the High Court of Admiralty in England, made in pursuance of the provisions of the Acts of the 3 and 4 Vict. cc. 65 and 66, and 17 & 18 Vict. c. 78, and the forms and fees thereby prescribed to be used and taken, shall, so far as the same are applicable, mutatis mutandis (and save as herein altered or varied) be, and they are hereby adopted as and directed to be, the Orders of the said Liverpool District Registry.

II.

In construing the Rules, the word "Registrar" shall mean the District Registrar, and the word "Registry" shall mean the District Registry. The words "Liverpool Registry" shall be used in all præcipes, affidavits, warrants, pleadings, &c., in the heading immediately below the words "In the High Court of Admiralty."

(Signed) Robert J. Phillimore,
Judge of the High Court of Admiralty.

February 16, 1871.

ADDITIONAL GENERAL ORDER FRAMED UNDER THE "LIVERPOOL ADMIRALTY DISTRICT REGISTRARS ACT, 1870."

The Right Honourable Sir Robert Joseph Phillimore, Knight, Judge of the High Court of Admiralty of England, doth hereby in pursuance of the provisions of the "Liverpool Admiralty District

Registrar's Act, 1870," order that the Additional Rules established for the High Court of Admiralty of England by Her Majesty's Order in Council of the 24th of March, 1871, with the Form of Release thereto annexed, shall apply mutatis mutandis to all causes instituted in the Liverpool District Registry, on or after the 1st of April, 1871.

(Signed) Robert J. Phillimore,
Judge of the High Court of Admiralty.

March 28, 1871.

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AMENDMENT OF PRÆCIPE—*Statement of the Nature of the Cause in the Præcipe to institute—Practice.*] The plaintiffs in a suit in rem in the præcipe to institute stated the cause to be a "cause of damage to cargo." The affidavit to lead warrant alleged that plaintiffs had sustained damage by breach of duty and breach of contract on the part of the master and crew of the ship proceeded against. After the arrest of the ship and appearance entered on behalf of her owners, the plaintiffs applied for leave to amend the statement of the nature of the cause of action by striking out of the præcipe to institute the words "damage to cargo." The Court granted leave to the plaintiffs to strike out these words, and to substitute the words "breach of duty and breach of contract on the part of the master and crew" on payment of the costs occasioned by the misstatement. THE PRINCESS ROYAL - - 27

2.—— *Leave to increase the Amount in which the Suit is instituted, after Admission by Defendants of their Liability.*] In a cause of collision after the defendants' vessel had been arrested and released on bail, the defendants admitted their liability and consented to a reference. The Court afterwards, under special circumstances, granted leave to the plaintiffs to amend the præcipe to institute, by increasing the amount in which the suit was instituted. THE JOHANNES - 127

AMENDMENT OF PRELIMINARY ACT—*Practice.*] The defendants in a cause of damage applied to the Court when the cause was called on for hearing, and before any evidence had been taken, for leave to amend a statement in their preliminary act, and to make a similar amendment in the answer. The Court allowed the amendment to be made in the answer, but refused to allow any amendment to be made in the preliminary act. THE FRANKLAND - - 511

AMENDMENT OF RATE—*Letters of Request*—5 *Geo.* 4, *c.* 36.] On the 29th of March, 1869, a rate was made by the churchwardens and overseers of the parish of E., in the diocese of Lichfield, for the repayment of money borrowed from the Public Works Loan Commissioners, under the provisions of 5 Geo. 4, c. 36. The defendant occupied a messuage and premises in the parish, in respect of which he was assessed, for the purposes of the rate, at the sum of 10*s.* 9*d.*; he refused to pay this sum, and disputed the validity of the rate. Letters of request were granted by the chancellor of the Bishop of Lichfield, directed to the judge of the Court of Arches, requesting the judge to call the defendant before him to answer "in respect of the said assessment."—A decree by letters of request was issued on the 29th of April, 1870, and the suit proceeded in the Arches Court. The defendant pleaded that a tithe rent-charge, the property of and received by the rector of the parish in commutation of certain tithes within the parish, was not assessed to the rate, and that a glebe house and lands within the parish, of which the rector was the owner and occupier, had been omitted from the assessment. The plaintiffs filed a responsive allegation, in which it was alleged that, in January, 1871, a meeting was duly held to amend the rate and the assessment on which the rate was made; and at the meeting the churchwardens of the parish, with the concurrence of the overseers, amended the assessment by adding to and including in such assessment the rectorial tithes, and glebe house and lands, and amended the rate by reducing the assessment on all the rateable property, and assessed the rector as owner of the tithes, and as owner and occupier of the glebe house and lands, and that the sum—in respect of which the defendant was assessed in the amended rate and assessment—amounted to 9*s.* 5*d.* instead of 10*s.* 9*d.*, and that the plaintiffs only claimed to recover the sum of 9*s.* 5*d.*—The defendant opposed the admission of the responsive allegation, and the Court held that the responsive allegation was inadmissible, because the Court had no jurisdiction to inquire concerning any other assessment than that mentioned in the letters of request. Asterley *v.* Adams - - 361

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BOOK OF COMMON PRAYER—*Ornaments of the Minister—Rites and Ceremonies of the Church.*] The rubric at the beginning of the Book of Common Prayer, which provides that "such ornaments of the church and of the ministers thereof at all times of their ministration, shall be retained, and be in use, as were in this Church of England, by the authority of Parliament in the second year of the reign of King Edward the Sixth," authorizes the use of the vestments mentioned in the first prayer-book of King Edward VI.—The following are the vestments which may lawfully be worn by ministers below the order of bishops when officiating at the communion service: the cope, the vestment or chasuble, the white albe plain, the surplice, the tunicle.—The cope may not lawfully be worn except at the communion service.—*Semble*, at all services, other than the communion service, no other vestment than the surplice may be worn by ministers below the order of bishops, except in cathedral churches and colleges, where the minister may wear beside his surplice such hood as pertaineth to his degree.—Albs with patches called apparels, tippets of a circular form, stoles, dalmatics, and maniples are unlawful ornaments, and may not be used by a minister during Divine service.—The cap called a biretta may lawfully be used by the minister during Divine service, as a protection to the head when needed.—Processions proceeding round the interior of a church, immediately before the commencement of morning or evening service, or immediately after the conclusion of morning or evening service, so conducted as to constitute a rite or ceremony in connection with the service, are illegal.—No addition can be permitted to the rites and ceremonies ordered by the Book of Common Prayer, and the performance during Divine service of any ceremony not prescribed by the Book of Common Prayer is unlawful. The ceremonial use of crucifixes or images during Divine service is unlawful.—It is lawful to administer wine mixed with water, instead of wine, to the communicants at the holy communion, provided that the wine and water be not mixed at the time of the celebration, so as to constitute a new rite or ceremony.—It is lawful to administer to the communicants at the holy communion wafer bread instead of bread such as is usual to be eaten, provided the wafer bread be broken by the priest.—*Semble*, it is unlawful to administer wafer bread unbroken.—It is lawful to place vases of flowers on the holy table, and to keep them there during the performance of Divine service, provided they are used as decorations only.—The leaving of the holy table wholly bare and uncovered during

BOOK OF COMMON PRAYER—*continued.*
Divine service is unlawful.—It is lawful for the priest during the prayer of consecration to stand between the people and the holy table with his back to the people.—It is unlawful for the priest to stand in front of the middle of the holy table, with his back to the people, when reading the collects for the day in the communion service, or the collects following the creed, or the epistle.—It is improper for a minister to give notice during Divine service of holidays which the church has not directed to be observed. Elphinstone *v.* Purchas 66

2. —— *The Doctrine of the Real Presence—Adoration of the Consecrated Elements—Practice—Duty of Promoter to proceed with reasonable Expedition.*] It is not contrary to law for a minister of the church to affirm or promulgate the doctrine that there is an actual and real Presence, external to the act of the communicant, in the elements consecrated in the administration of the Sacrament of the Holy Communion. It is unlawful for a minister of the Church to teach:—First, That there is a visible presence of our Lord upon the altar at the celebration of the Holy Communion. Secondly, That adoration is due to the consecrated elements. It is the duty of the promoter of a criminal suit to prosecute the suit with reasonable expedition. If he neglects to do so, the Court may dismiss the suit. Sheppard *v.* Bennett - 167

3. —— *The Use of lighted Candles—The Use of Incense.*—To cause lighted candles to be held one on each side of the priest when reading the gospel, such lighted candles not being required for the purpose of giving light, is unlawful. The ceremonial lighting and burning of candles, placed on a ledge or shelf over the holy table, and of candles placed on each side of the holy table, is, during the communion service, unlawful. The ceremonial use of incense immediately before the celebration of the holy communion, so as to be preparatory or subsidiary to the celebration of the holy communion, is unlawful. Bishop Sumner *v.* Wix - - - - - - - - 58

BOTTOMRY BOND—*Given to procure release of British Vessel under Arrest at a Foreign Port, not upheld.*] In 1867 an English vessel, then at Monte Video, was chartered by W. to proceed with cargo to certain ports in South America. She took in the agreed cargo, and sailed according to orders, first to one and then to another of the ports of discharge named in the charter. A portion of the cargo was delivered, but the master failing to obtain any directions for the discharge of the residue, after considerable delay and after notice to the consignee, sold it to defray expenses. The vessel, after having been several other voyages, arrived at Buenos Ayres in 1868, and procured a charter to an English port. After this last-mentioned charter had been entered into, W. instituted legal proceedings at Buenos Ayres to recover damages for the non-delivery of the cargo shipped by him, and caused the vessel to be arrested for the damages so claimed. The arrest was under process valid according to the law in force at Buenos Ayres. By the advice of the British consul at Buenos Ayres, the master agreed with W. to compromise the dispute by giving to W. a bottomry bond for a sum of money considerably less than the amount claimed by him. The bond was given, and the vessel was released.—In

BOTTOMRY BOND—*continued.*
a suit instituted on behalf of W. and his partner in trade against the vessel after her safe arrival home to enforce the bond:—*Held*, that the circumstances under which the bond was given rendered it incapable of being enforced. The Ida - - - - - - - 542

BREACH OF CONTRACT BY SHIPOWNER—*Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *s.* 6—*Jurisdiction—Authority of Master to sign Bills of Lading—Outbreak of War—Right of Consignee to Delivery of Cargo at a Port short of the Port of Destination—Pro ratâ Freight—Conflict of Laws—General Maritime Law.*] A schooner sailing under the flag of the North German Confederation, and owned by subjects of one of the states of the Confederation, was chartered by a German firm for a voyage from the west coast of Central America to a port on the Continent, between Havre and Hamburg, and Bordeaux inclusive, or a port of Great Britain. The charterparty was in the German language, and provided that the master should not be responsible for dangers of the sea, for events caused by high powers or any other event of navigation. The schooner was loaded at ports on the west coast of Central America with a general cargo of goods shipped to be delivered at Hamburg to several consignees. Part of the cargo consisted of a parcel of coffee shipped by a foreign firm. This coffee was stowed near the bottom of the hold, and goods consigned to other consignees were stowed above it. For this coffee the master signed bills of lading in the English language; the bills of lading contained no reference to the charterparty, and provided that the coffee should be delivered at Hamburg (the dangers of the seas only excepted) unto the plaintiffs or to assigns. The plaintiffs were merchants, carrying on business in London, and at the time of the shipment neither they nor the shippers had notice of the charterparty. On the 5th of April, 1870, the schooner sailed on her voyage to Hamburg; during the voyage, her master and one of her crew became dangerously ill, and in order to obtain medical assistance her course was shaped for Falmouth. When near Falmouth, she heard, as the fact was, that a war which had broken out after the date of the sailing of the vessel on her homeward voyage, was being waged between the states of the North German Confederation and France. She put into Falmouth on the 23rd of August, and after having obtained such assistance as she needed, she continued to remain there until after the institution of the suit on the 7th of November. Before the schooner arrived off Falmouth, the French fleet had instituted a blockade of the port of Hamburg, which was maintained until September. The raising of the blockade was notified on the 18th of September. The war continued until after the date of the institution of the suit, and until after that date armed French national cruisers were cruising in the English Channel and North Sea, and German vessels could not sail in those seas beyond the limits of neutral waters without incurring risk of capture. The plaintiffs heard of the arrival of the schooner at Falmouth soon after she put in there, and they acquiesced in her remaining there during the blockade of Hamburg, but they did not acquiesce in her remaining there

BREACH OF CONTRACT BY SHIPOWNER—*cont.*
after the raising of the blockade. During the blockade, the plaintiffs offered to take delivery of the coffee at Falmouth and to pay full freight there, and after the raising of the blockade they offered to take delivery of the coffee on the same terms at Falmouth or at Hamburg. Those in charge of the schooner refused to deliver the coffee at Falmouth.—In a suit in rem, instituted by the plaintiffs against the schooner for breach of duty or breach of contract, on the part of her owners or master:—*Held*, following *The Bahia* (Br. & L. 62), that the Court had jurisdiction to entertain the suit. That the contract contained in the bill of lading was not affected by the terms of the charterparty, and that the schooner was liable for any breach of the terms of the bill of lading. That according to the terms of the bill of lading the breaking out of the war did not relieve the schooner from her obligation to fulfil the contract; that within a reasonable time after the notification of the raising of the blockade of Hamburg the schooner was bound to proceed on her voyage there, and her neglect to proceed on her voyage there from the 18th of September until the date of the institution of the suit constituted a breach of contract. That whether the rights of the parties with reference to the delivery of the coffee at Falmouth depended upon the provisions of the English law, the German law, or the general maritime law, the refusal of those in charge of the schooner to deliver the goods to the plaintiffs at Falmouth, after the offer to pay full freight, was not justifiable.—*Lloyd* v. *Guibert* (Law Rep. 1 Q. B. 115) considered.—Observations upon the general maritime law. The Patria - - - - - 436

2. —— *Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *s.* 6—*Damage to Cargo—Breach of Duty or Breach of Contract on the part of Owner and Master—Civil Proceedings founded upon Acts alleged to be Felonious.*] In a cause in rem, instituted on behalf of the assignees of a bill of lading, the petition alleged that, whilst the vessel was on a voyage to a British port with the cargo mentioned in the bill of lading on board, the master and sole owner of the vessel wilfully cut down and destroyed parts of the vessel, and wilfully abandoned the vessel on the high seas; and the vessel and cargo were afterwards taken possession of as derelict by certain salvors, and towed by them into a British port, and the cargo never was delivered by the defendant to the plaintiffs in accordance with the terms of the bill of lading, although such non-delivery was not occasioned by any of the perils in the bill of lading excepted, and the plaintiffs were compelled to pay money to the salvors before they could get possession of the cargo, and the delivery of the cargo to the plaintiffs was delayed. It appeared from the proceedings in the cause that the vessel was a foreign vessel and the master was a foreign subject:—*Held*, that the facts disclosed a breach of duty or breach of contract within the meaning of the 6th section of the Admiralty Court Act, 1861, in respect of which the plaintiffs were entitled to institute a cause in rem, and that it was competent to the plaintiffs to institute such cause, although no criminal proceedings had been taken against the defendant. The Princess Royal - 41

BREACH OF CONTRACT BY SHIPOWNER—*cont.*

3.—— *Charterparty—Performance of Contract rendered Unlawful by Outbreak of War—Imminence of War—Effect of upon Rights of Parties—Pro ratâ Freight where Contract put an end to by War.*] The master of a Prussian brig, a subject of the King of Prussia, agreed by charterparty with persons representing the plaintiffs, that the brig should load a cargo of nitrate of soda at a port in South America, and proceed therewith to Cork, Cowes, or Falmouth, for orders to any safe port in Great Britain, or on the Continent, between Havre and Hamburg. The brig was loaded with a cargo of nitrate of soda at a port in South America as agreed, and sailed on her homeward voyage. Before sailing the master signed a bill of lading, which, after stating that the brig was bound to Cork, Cowes, or Falmouth for orders, provided that the cargo should be delivered to the plaintiffs, the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of what nature and kind soever excepted. At the time of the making of the charterparty, and from thence until after the sailing of the ship, Prussia was at peace. On the 10th of July the brig arrived at Falmouth, and the next day she received orders to proceed to Dunkirk. She sailed for Dunkirk, and arrived off that port on the 16th, but the tide did not serve for her to enter. While off the port on the 16th the brig was boarded by a pilot, who told the master that war had broken out between France and Prussia. The brig then returned to the Downs, and anchored there on the 17th, which was Sunday. On the 18th the master telegraphed to the owner of the brig for instructions, and the owner answered that the brig was not to go to Dunkirk. On the 19th the brig put into the port of Dover, and there she remained. It was proved that on the 10th of July the apparent imminence of war between France and Prussia was such as to alarm all Europe, and that on the 15th of July the French government made a formal declaration in the Corps Législatif and in the Senate, stating that the King of Prussia had notified to the French ambassador at Berlin that he would not receive him any more, and had communicated this refusal to the cabinets of Europe. No formal declaration of war was delivered till the 19th. On that day the French government delivered a declaration of war to the Prussian government:—*Held*, that the master of the brig was entitled, under the circumstances, to pause before entering the port of Dunkirk, and to take a reasonable time for making inquiries, and that he was not guilty of any breach of duty or breach of contract.—After the 19th of July the plaintiffs demanded of the master the delivery of the cargo at Dover, but made no definite offer to pay pro ratâ freight. The master refused to comply with this demand:—*Held*, that the refusal of the master was justifiable, and that he was not bound to deliver the goods without some compensation for the carriage of the goods. The Teutonia - - - - 394

4. —— *Charterparty—Bill of Lading—Queen's Enemies, restraint of Princes and Rulers—Risk of Capture—Reasonable Delay.*] A vessel sailing

BREACH OF CONTRACT BY SHIPOWNER—*cont.*
under the flag of the North German Confederation was, by a charterparty made at Constantinople, in the English language, between her master and a firm of merchants at Constantinople, chartered to take on board a cargo at a port in the Sea of Azov, and to proceed therewith to a safe port in the United Kingdom, or a safe port on the Continent between Havre and Hamburg, calling at Cork, or Falmouth, or Plymouth, for orders, and deliver the cargo on being paid the stipulated freight, the act of God, the Queen's enemies, restraint of princes and rulers, fire, and all and every the dangers and accidents of the seas, rivers, and navigation of what nature and kind soever excepted.—In pursuance of the terms of the charterparty the vessel proceeded to Berdiansk, and took on board, from a Greek merchant there, a cargo of wheat. For the cargo a bill of lading, in the Italian language, was signed by the master. It was stated in the bill of lading that the cargo was consigned according to the tenor of the charterparty, and that the cargo was to be delivered on freight being paid according to the charterparty, with all other conditions expressed therein. The bill of lading was indorsed by the shipper to S. & Co., who were the charterer's agents in London. The vessel sailed from Berdiansk; on the 8th of August she put into Falmouth, and her master applied to S. & Co. for orders. The master received no orders till the 3rd of September, when the plaintiffs, to whom S. & Co. had indorsed the bill of lading, ordered the vessel by their agent to proceed to Leith.—After the making of the charterparty and the signing of the bill of lading a war broke out between the North German Confederation and France. The war continued until after the arrest of the vessel in the suit. From the time the master received orders to proceed to Leith until after the arrest of the vessel armed French national cruisers were cruising in the English Channel and North Sea, and German vessels could not sail in those seas beyond the limits of neutral waters without incurring risk of capture.—When the master received orders to proceed to Leith, and on other occasions after that time and before the arrest of the vessel, he expressed his willingness to sail for Leith the first favourable opportunity.—From the time the master received orders to proceed to Leith until the arrest of the vessel, the prevailing winds at Falmouth were light and variable, or unfavourable for a passage to Leith, and during that time the master kept the vessel at Falmouth waiting for a leading wind, which would enable her to make a good passage, and afford her a fair chance of escaping the French cruisers.—On the 15th of September, the plaintiffs instituted a suit against the vessel, alleging, as the cause of action, the neglect of the master to proceed to Leith. On the 21st of September the vessel was arrested in the suit at Falmouth:—*Held*, that the delay of the master under the circumstances was justifiable.—Before the orders to sail for Leith were given, and afterwards, negotiations were continually going on between the plaintiffs and the master for the delivery of the cargo at Falmouth at a reduced freight, but no terms were agreed upon.—*Semble*, these negotiations modified the order to proceed

BREACH OF CONTRACT BY SHIPOWNER—*cont.*
to Leith, and afforded a reasonable excuse for the master remaining at Falmouth while the negotiations were being carried on. The Heinrich. [424

5. —— *Delay in the Prosecution of a Voyage justified by risk of Capture by Enemies' Cruisers—Queen's Enemies—Restraints of Princes and Rulers—Terms of Bill of Lading modified by the Terms of Charterparty.*] A charterparty was entered into between an English firm and a Hamburg firm, the owners of the *R.*, a vessel belonging to Hamburg. The charterparty provided that the vessel should proceed to a foreign port and there load a cargo, and therewith proceed to a port within certain limits mentioned—the act of God, the Queen's enemies, restraint of princes and rulers, and dangers of the seas excepted. It was provided that the master should sign bills of lading as required, but at not less than the chartered rate, without prejudice to the charterparty. The plaintiffs, with full knowledge of the terms of this charterparty, shipped a cargo at the port of loading under bills of lading by which it was provided that the goods should be delivered at a port within the limits mentioned in the charterparty as ordered, the dangers of the seas only excepted. After the making of the charterparty, and the shipment of the goods, war broke out between the North German Confederation and France. The ship on her homeward voyage sustained damage at sea, and was compelled to put into a neutral port for necessary repairs, and there finding that French cruisers were in the vicinity, she remained for a long time after the necessary repairs were completed, in order to avoid the risk of capture. The risk of capture was such as to render it reasonable and prudent for the master, having regard to the preservation of his ship, to remain in port. On the departure of the cruisers the master sailed on his voyage, and delivered the cargo according to orders, at an English port within the limits mentioned in the charterparty. In a suit brought by the plaintiffs to recover damages for the delay incurred in order to avoid risk of capture:—*Held*, that the delay was justifiable.—*Semble*, that the single exception of dangers of the seas mentioned in the bill of lading did not, under the circumstances, exclude the other exceptions mentioned in the charterparty. The San Roman. 583

6. —— *Delay in order to avoid Risk of Capture—Refusal of Master to Tranship.*] A charterparty, written in the English language, but entered into at Constantinople between freighters who were subjects of the North German Confederation, resident there, and the master of a North German vessel owned by subjects of the North German Confederation, provided that the vessel should proceed to Taganrog, and there take on board a cargo as therein mentioned, to be carried to Queenstown, Falmouth, or Plymouth for orders, and thence to a safe port in the United Kingdom, or a safe port on the Continent between Havre and Hamburg, both inclusive, or as near thereunto as he could safely get, and deliver the same on being paid freight as therein mentioned, the act of God, the Queen's enemies, restraint of princes and rulers, among other perils therein mentioned, excepted. In pursuance of the terms of the charterparty the

BREACH OF CONTRACT BY SHIPOWNER—*cont.*
vessel proceeded to Taganrog, and a cargo, as agreed, having been shipped on board, bills of lading were signed by the master of the vessel, under which the cargo was to be delivered at a safe port in the United Kingdom or on the Continent, as per charterparty, the act of God and the Queen's enemies excepted. On the 29th of June, 1870, the vessel sailed on her voyage with the cargo to Falmouth, one of the ports of call mentioned in the charterparty, and on the 16th of August put into Algesiras in order to obtain a supply of water. She there learnt, as the fact was, that since she had sailed from Taganrog a war had broken out between France and the North German Confederation, and was still existing. In order to avoid capture by the French cruisers the vessel proceeded to Gibraltar, where she arrived on the 15th of August, and remained there with her cargo on board till the 2nd of February, 1871, when, after receiving news that an armistice had been concluded between France and the North German Confederation, she sailed for Falmouth and delivered her cargo, according to orders, in London. Whilst the vessel was lying at Gibraltar her master was requested by the owners of cargo to proceed on his voyage, and if he would not do so, then to tranship and forward the cargo to its destination at the expense of his owners, but no tender of freight or expenses was made, such as according to German law was necessary to entitle the owners of the cargo to demand its transhipment. The war continued until January, 1871, and if the vessel had left Gibraltar during the war she would have run great risk of capture from French cruisers:—*Held*, that under the circumstances the master was justified in proceeding with his ship to Gibraltar, and keeping her there with her cargo on board during the continuance of the war:—*Semble*, the law to be applied to the execution of the contract was German law. The Express. 597

BROKER'S COMMISSION—County Court—Admiralty jurisdiction - - - 483
See County Court Jurisdiction. 1.

CANDLES—Use of lighted, in Church - 58
See Book of Common Prayer. 3.

CARGO—Damage—Felony—Civil proceedings 41
See Breach of Contract by Shipowner. 2.

—— Delivery at port short of destination - 436
See Breach of Contract by Shipowner. 1.

—— Evidence of value - - - 129
See Evidence of Value of Cargo.

CASE—*The Bahia* (Br. & L. 62) followed 436
See Breach of Contract by Shipowner. 1.

—— *The Comtesse de Frègeville* (Lush. 329) observed upon - - - 516
See Necessaries for Ship. 4.

—— *Lloyd* v. *Guibert* (Law Rep. 1 Q. B. 115) considered - - - - 436
See Breach of Contract by Shipowner. 1.

—— *The Maria Jane* (14 Jur. 857) distinguished
See Salvage. 8. [142

CASES—*continued.*

—— *The Pacific* (Br. & L. 243) commented upon
See Necessaries for Ship. 2. [345

—— *Simpson* v. *Blues* (Law Rep. 7 C. P. 290) disapproved, but followed - 568
See County Court Jurisdiction. 6.

—— *Webster* v. *Seekamp* (4 B. & Ald. 352) followed
See Necessaries for Ship. 4. [516

CEREMONIES—Ornaments - - - 66
See Book of Common Prayer. 1.

CHARTERPARTY—Breach—War 394, 424, 583, [597
See Breach of Contract by Shipowner. 3, 4, 5, 6.

CHILD EN VENTRE SA MERE—Loss of life—Damage - - - - 466
See Lord Campbell's Act.

CHURCH—Lighted candles - - 58
See Book of Common Prayer. 3.

—— Removal of ornaments by churchwardens
See Churchwardens. [113

—— Rites and ceremonies - - - 66
See Book of Common Prayer. 1.

CHURCHWARDENS—*Vestry Meeting—Removal of Ornaments placed irregularly in a Parish Church—Custody of the Key of the Parish Church.*] A ledge or super-altar was placed on the holy table in a parish church by the order of the incumbent without the consent of the ordinary; after a lapse of many months a vestry meeting was held, at which a resolution was passed that the churchwardens should take steps to remove the super-altar; the morning after the vestry meeting the defendant, one of the churchwardens, sent to the incumbent for the keys of the church; the incumbent refused to give the defendant the keys, but sent word that the defendant could have access to the church that day between eleven o'clock in the forenoon and one o'clock in the afternoon. About one o'clock the defendant went to the church with a workman and found the church door locked; the workman, acting by the orders of the defendant, picked the lock, entered the church in company with the defendant, and pulled down the super-altar:—*Held*, that the conduct of the defendant was illegal:—*Semble*, ornaments which have been illegally or irregularly placed in a parish church by the incumbent cannot be lawfully removed, save under the sanction of the ordinary.—*Semble*, the powers conferred upon the churchwardens of a parish cannot be exercised by one of the churchwardens without the concurrence of his colleague.—Churchwardens have a right of access to the church at proper seasons, but they are not entitled to the custody of the keys of the church. Ritchings *v.* Cordingley - - - - - 113

COLLISION—Jurisdiction - - - 574
See County Court Jurisdiction. 5.

COMMON LAW PROCEDURE ACT, 1854, (17 & 18 Vict. c. 125) ss. 50, 51, 52 - 148
See Interrogatories in Admiralty Court.

COMMUNION—Real Presence - - 167
See Book of Common Prayer. 2.

CONSOLIDATED CAUSES—*Practice.*] The Court will, where it is convenient to do so, order one of

CONSOLIDATED CAUSES—*continued.*
several consolidated causes to be referred to the registrar separately. The Helen R. Cooper 339

2. —— *Evidence—Practice—Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *s.* 34.] In consequence of a collision between vessels A. and B., both the vessels and also the cargo laden on board the A. sustained damage. A suit in rem was instituted by the owners of the A. against the B. to recover the damage done to their vessel. A cross suit was instituted by the owners of the B against the A. These suits were heard and determined. Afterwards a suit in rem was instituted on behalf of the owners of the cargo on board the A. against the B. to recover the damage done to the cargo:—*Held*, that the Court had no power to order the evidence taken in the suit brought by the owners of the A. against the B. to be admitted in the suit instituted on behalf of the owners of cargo. The Demetrius - 523

CONFLICT OF LAWS - - - 436
See Breach of Contract by Shipowner. 1.

CONTRACT—Breach by shipowner—Damage to cargo—Felony—Civil proceedings 41
See Breach of Contract by Shipowner. 2.
—— Shipowner—Breach 41, 394, 424, 436, 583, [597
See Breach of Contract by Shipowner. 1, 2, 3, 4, 5, 6.
—— Towage - - - - 48
See Towage.

CO-OWNERS, CAUSE BETWEEN—*The Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *s.* 8—*Jurisdiction.*] The plaintiff and defendant were co-owners of a ship. The plaintiff sold his share in the ship to a third person, and afterwards instituted a suit in rem in the Court of Admiralty to have an account taken between himself and the defendant in relation to the employment and earnings of the ship during the time he and the defendant were co-owners:—*Held*, that as the suit related to questions which arose between the plaintiff and defendant while they were co-owners the Court had jurisdiction to entertain the suit, notwithstanding the plaintiff had ceased to be a co-owner at the time of the institution of the suit. The Lady of the Lake - 29

COSTS—Admiralty—Admission of documents 316
See Notice to admit
—— Admiralty—Transfer of cause from County Court - - - - 314
See Transfer of Cause from County Court.
—— Inspection of documents - - 23
See Production of Documents.
—— Security — County Court — Appeal — Admiralty - - - - 299
See County Court Appeal. 3.
—— Bail—Release of ship - - 495
See Release of Vessel on Bail.
—— Tender - - - - 15, 504
See Tender on Costs.

COSTS UNDER COUNTY COURT ACTS—*County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *ss.* 3 *and* 9—*Merchant Shipping Act Amendment Act*, 1862 (25 & 26 *Vict. c.* 63), *s.* 54.]
An action of damage was instituted in the Admiralty Court in a sum exceeding 300*l.* It was admitted that the defendant's ship was to blame, and that the damage sustained by the plaintiff's ship exceeded 300*l.* The defendant proved by affidavit that he was entitled, under the 54th section of the Merchant Shipping Act, 1862, to have his liability limited to a sum less than 300*l.*, and a tender of less than 300*l.* was accepted by the plaintiffs:—*Held*, that the 9th section of the County Courts Admiralty Jurisdiction Act, 1868, did not disentitle the plaintiffs to costs. The Young James - - - 1

COUNTY COURT—Admiralty jurisdiction 14, 134, 483, 502, 568, 574
See County Court Jurisdiction. 1, 2, 3, 4, 5, 6.
—— Appeal - - - 33, 285, 299, 527
See County Court Appeal 1, 2, 3, 4.
—— Costs - - - - - 11
See Costs under County Court Acts.
—— Transfer of cause to Admiralty - 314
See Transfer of Cause from County Court.

COUNTY COURT APPEAL — *Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *s.* 31—*Appeal to the Court of Admiralty—Cross Causes of Damage heard at the same Time and upon the same Evidence.*] Cross causes of damage, each instituted in the sum of 100*l.*, were heard in the City of London Court at the same time and upon the same evidence. A decree was pronounced in the first cause, dismissing the cause; by the decree in the second cause the defendants' ship was pronounced solely to blame. By agreement the amount of damage was referred to the assessors of the Court. The owners of the ship pronounced solely to blame, entered two appeals in the Court of Admiralty, one against the decree in each cause:—*Held*, on motion to dismiss the appeal in the second cause, that on proof that the damage decreed to be due in that cause did not exceed the sum of 50*l.*, the appeal must be dismissed. The Elizabeth - - 33

2. —— *Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71) *s.* 29—*Appeal from Decree or Order of the Court of Admiralty on Appeal from a County Court.*] As a general rule the Court of Admiralty will not grant permission to appeal from a decree or order of the Court made on appeal from a county court except in cases where the law is doubtful; or where the facts are such as to leave a substantial doubt on the mind of the Court whether the conclusion at which it has arrived is right; or where the pecuniary interest involved is large. The Samuel Laing - 285

3. —— *Security for Costs—The County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *ss.* 26 *and* 27.] Before an appeal is made to the Court of Admiralty from a decree or order of a county court in an Admiralty cause, security for costs must be given. Such security must be given in the county court before lodging the instrument of appeal in the registry of the Court of Admiralty. The Forest Queen - - - 299

4. —— *Practice—Examination of Witnesses Viva Voce—Notes of Evidence in the County Court.*]

COUNTY COURT APPEAL—*continued.*
The court may order witnesses to be examined vivâ voce at the hearing of a cause of appeal from the county court. But such order will not be made except under special circumstances.—Wherever there is a probability of an appeal, notes of the evidence given in the county court should be taken by a reporter duly appointed, according to the provisions contained in the rules for regulating the Admiralty jurisdiction of the county courts. THE BUSY BEE - - - - 527

COUNTY COURT JURISDICTION—*Broker's Commission—The County Courts Admiralty Jurisdiction Amendment Act*, 1869 (32 & 33 *Vict. c.* 51), *s.* 2—*Jurisdiction.*] A charterparty for the charter of the ship *N.*, entered into between the master of the ship and a firm of Liverpool merchants, contained a clause stating that 2½ per cent. commission was due on the execution of the charterparty to J. & K. J. & K., who were the brokers who had effected the charterparty, instituted a suit against the ship to recover this commission in the Court of Passage (Admiralty Jurisdiction). The Court dismissed the suit, on the ground that it had no jurisdiction to entertain the claim. On appeal, the Court of Admiralty held, that the claim did not arise out of any agreement made in relation to the use or hire of a ship, or in relation to the carriage of goods in any ship, within the meaning of the 2nd section of the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), and affirmed the decision of the Court below. THE NUOVA RAFFAELINA 483

2. —— *Jurisdiction—Salvage—Property under 1000l. in value—The County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71, *s.* 9).] A salvage suit was instituted in the Court of Admiralty, in a sum exceeding 300*l.*, the value of the property saved was less than 1000*l.*:—*Held*, that the Court had jurisdiction to entertain the suit. THE EMPRESS - - - 502

3. —— *Jurisdiction of Court of Passage—The County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *s.* 3—*Necessaries—Appeal.*] From the decision of the Court of Passage in an Admiralty cause, an appeal lies to the Court of Admiralty.—In an Admiralty cause, instituted in the Court of Passage to recover a claim for necessaries supplied to a vessel in the port of Liverpool, the defendants in their answer alleged that at the time the necessaries were supplied the vessel belonged to the port of Liverpool, and that at the time of the institution of the suit a part owner of the vessel was domiciled in England. These allegations were objected to by the plaintiffs as irrelevant, and the Assessor of the Court of Passage ordered them to be struck out. On appeal to the Court of Admiralty the decision of the Assessor was reversed on the ground that the County Courts Admiralty Jurisdiction Act, 1868, does not confer upon the Court of Passage a more extensive jurisdiction as to any claim for necessaries, than that exercised by the Court of Admiralty. THE DOWSE [135

4. —— *Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *s.* 9—*Order to take Proceedings in the High Court of Admiralty.*] In pursuance of the 9th section of the County Courts Admiralty Jurisdiction Act, 1868, application may be made to the Court of Admiralty for an order to institute in that court proceedings which might have been taken without agreement in a county court, and the Court of Admiralty will, if it sees fit, make such order. THE BENGAL - - - 14

5. —— *Jurisdiction to entertain a Suit in Personam—Liability of Pilot to be sued for Damages arising from Collision—County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71, *s.* 3)—*County Courts Admiralty Jurisdiction Act Amendment Act*, 1869 (32 & 33 *Vict. c.* 51, *s.* 3.)] A ship by compulsion of law in charge of a duly licensed pilot in the river Mersey came into collision with and occasioned damage to another vessel. The owners of the damaged vessel instituted an Admiralty suit in the Court of Passage against the pilot:—*Held*, on appeal affirming the decision of the Assessor of the Court of Passage, that the Court of Passage had not jurisdiction to entertain the suit:—*Semble*, the Court of Admiralty has not jurisdiction to entertain such a suit. THE ALEXANDRIA - - - - 574

6. —— *Admiralty Causes—The County Courts Admiralty Jurisdiction Act*, 1869 (32 & 33 *Vict. c.* 51), *s.* 2—*Claim arising out of an Agreement made in Relation to the Use or Hire of any Ship, or to the Carriage of Goods in any Ship.*] The Court of Common Pleas having decided in *Simpson* v. *Blues* (Law Rep. 7 C. P. 290), that the County Courts Admiralty Jurisdiction Act, 1869, s. 2, does not extend the Admiralty Jurisdiction of the county courts to any matters in respect of which this Court does not possess jurisdiction, this Court though disapproving of that decision held that it was bound to follow it. CARGO EX ARGOS. THE HEWSONS - - - - - 568

COUNTY COURTS ADMIRALTY JURISDICTION ACT, 1868 - - 33, 285, 299, 527
See COUNTY COURTS APPEAL. 1, 2, 3, 4.

—— - - 14, 135, 483, 502, 568, 574
See COUNTY COURT JURISDICTION. 1, 2, 3, 4, 5, 6.

—— - - - - - - 314
See TRANSFER OF CAUSE FROM COUNTY COURT.

COUNTY COURTS ADMIRALTY JURISDICTION AMENDMENT ACT - - 568, 574
See COUNTY COURTS JURISDICTION. 5, 6.

—— - - - - - - 314
See TRANSFER OF CAUSE FROM COUNTY COURT.

COURT OF ARCHES JURISDICTION—Letters of request - - - - 361
See AMENDMENT OF RATE.

COURT OF PASSAGE JURISDICTION - 571
See COUNTY COURT JURISDICTION. 5.

CROSS CAUSES—County Court—Appeal - 33
See COUNTY COURT APPEAL. 1.

DAMAGE—*Jurisdiction—The Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *s.* 7—*Damage to Telegraph Cable.*] A ship cast anchor near the South Foreland. Her anchor got foul of a submarine

DAMAGE—*continued.*

telegraph cable. The crew heaved up the anchor to the water's edge, and the telegraph cable came up entangled with it. In order to free the anchor from the telegraph cable the mate of the ship, acting under the direction of the master, cut the telegraph cable in two with a hatchet. By the exercise of ordinary nautical skill the anchor might have been freed from the cable by the crew, without cutting the cable:—*Held*, that the Court had jurisdiction to entertain an action instituted by the owners of the telegraph cable against the ship for the damage done to the cable, and that the owners of the telegraph cable were entitled to judgment in the action. The Clara Killam - - - - - - 161

2. —— *Jurisdiction*—3 & 4 *Vict. c.* 65, *s.* 6—*The Admiralty Court Act*, 1861 (24 *Vict. c.* 10, *s.* 7.] The petition in a damage suit alleged that the plaintiffs' vessel, in the early morning when it was dark, was proceeding under sail in the channel leading to the harbour at H., when the vessel *I.*, which had not any light exhibited, was made out ahead; the helm of the plaintiffs' vessel was then ported, but as soon as this had been done it was discovered that the *I.* was across the channel, and that the plaintiffs' vessel was in imminent danger of running into her; the helm of the plaintiffs' vessel was put hard aport to avoid running into the *I.*, and thereby the plaintiffs' vessel was compelled to go out of the fair-way of the channel, and in consequence thereof she took the ground and drove against the town wall of H. and sustained damage, and also did damage to the wall; that the damage to the plaintiffs' ship, and the losses of the plaintiffs by reason thereof, were occasioned by negligence of those on board or in charge of the *I.* in having got the *I.* across the fair-way, and in leaving her there without any light exhibited or other measures taken to warn other vessels of her position; that the measures taken by the plaintiffs' vessel to avoid coming into collision with the *I.* were proper and necessary for that purpose; and after taking such measures those on board the plaintiffs' vessel were unable to prevent their vessel taking the ground and suffering the damage aforesaid:—*Held*, that the petition disclosed a good cause of action, and that the Court had jurisdiction to entertain the action. The Industrie - - - - - 303

DAMAGE TO CARGO—Felony—Civil proceedings [41

See Breach of Contract by Shipowner. 2.

DAMAGE TO TWO SHIPS ON ONE OCCASION 539

See Limitation of Shipowner's Liability. 1.

DECREE—Priority—Admiralty Court - 340

See Priority of Decree.

DELIVERY OF CARGO—Port short of destination [436

See Breach of Contract by Shipowner. 1.

DERELICT—*Salvage—Apportionment.*] A steamer laden with a valuable cargo, and having passengers on board, fell in with a derelict brig in the Bristol Channel, and with great difficulty, in spite of a strong wind and heavy sea, succeeded in towing her into port. The value of the brig, together with her cargo and freight, amounted to nearly £2800. The Court awarded £900 to the salvers. The Andrina - - - 286

DISCOVERY—Interrogatories - - 148

See Interrogatories in Admiralty Court.

DOCTRINE—Real Presence - - 167

See Book of Common Prayer. 2.

DOCUMENTS—Production—Costs - - 23

See Production of Documents.

EVIDENCE—Consolidated causes - - 523

See Consolidated Causes. 2.

—— County Court appeal - - - 327

See County Court Appeal. 4.

—— Documents—Inspection - - 23

See Production of Documents.

—— Interrogatories - - - - 148

See Interrogatories in Admiralty Court.

—— Receiver of wreck—Examination - 56

See Examination by Receiver of Wreck.

—— Value of cargo—Ownership - - 129

See Evidence of Value of Cargo.

EVIDENCE OF VALUE OF CARGO—*Ownership of Cargo—Underwriters—Bill of Lading—Practice.*] Two vessels, the *B.* and the *E.*, came into collision. The *E.* went down, and her cargo was lost. A cause of damage was instituted against the *B.* by *S.* and others, who described themselves as owners of the cargo ex *E.* On the hearing of the cause, the *B.* was pronounced solely to blame, and a reference was directed. At the reference it appeared that the plaintiffs S. and others were underwriters, who had paid the shippers as for a total loss upon the cargo ex *E.*, and to whom the bills of lading had been given up. S. and others produced the bills of lading and the invoices, shewing the prices at which the goods had been invoiced to the shippers. The defendants contended that this evidence was insufficient to enable the Registrar to make his report. A special case was stated by the Registrar for the opinion of the Court:—*Held*, that the evidence before the Registrar was insufficient, and that the defendants were entitled to require evidence of a discharge from the owners of the cargo, and better evidence of the value of the cargo before the Registrar proceeded to report upon the amount of compensation due. The John Bellamy - 129

EXAMINATION BY RECEIVER OF WRECK—*Evidence—The Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *ss.* 448, 449.] The examination of the crew of a salved vessel taken by the receiver of wreck under the 448th section of the Merchant Shipping Act, 1854, is not admissible as evidence in a salvage suit for the purpose of proving the facts stated in the examination. The Little Lizzie - - - - - 56

FELONY—Civil proceedings for breach of contract —Damage to cargo - - 41

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FOREIGN ARREST—Release of vessel—Bottomry

See Bottomry Bond. [542

FOREIGN ENLISTMENT ACT, 1870—(*33 & 34 Vict. c. 90 —Ship Employed in the Military or Naval Service of a Foreign State—Military Telegraphy—Employment in Connection with any Military Operation.*] At a time when there was war between France and Germany an English company entered into a contract with the French government to lay down in the sea a series of telegraph cables, between certain places on the French coast. The places on the coast, between which the cables were to be laid, were so situated that by means of short telegraph lines carried over land, the series of cables could be united in one line, and be made to afford complete telegraphic communication between Dunkerque and Verdon. The company having shipped the telegraph cables on board a steam-ship belonging to them, specially fitted for the purpose of laying submarine cables, were, during the continuance of the war, about to despatch the steam-ship from the port of London, to lay down the cables according to the contract, when the steam-ship was, by order of one of Her Majesty's principal Secretaries of State, detained upon the ground that it was about to be despatched contrary to the Foreign Enlistment Act, 1870.—On motion for the release of the ship it was proved, to the satisfaction of the Court, that the undertaking in which the ship was about to be engaged was of a commercial character; that the object of the contract was to furnish ordinary postal telegraphy, and that the company were not parties, directly or indirectly, to any project for adapting the line of cable to military purposes:—*Held*, that the company were entitled to have the ship released.—Although the Court considered it probable that the line, when complete, would be partially used for effecting communication between the armies of France, it held that such probability was not sufficient to divest the line of its primary commercial character, or to clothe the service to be rendered by the ship with the character of a "military or naval service" within the meaning of the Foreign Enlistment Act, 1870:—*Semble*, a ship employed in the service of a foreign belligerent State, to lay down a submarine cable, the main object of which is, and is known to be, the subserving of the military operations of the belligerent State, is employed in the military or naval service of that State within the meaning of the Foreign Enlistment Act, 1870. The International - - - - - - 321

2. —— *s. 8, subs. 4—Military or Naval Service —Employment of a Steam-tug to tow a Prize of War—Title of Captor to Prize, when complete.*] During the late war between the North German Confederation and France, a Prussian merchant vessel was captured in the English Channel, as prize of war, by a ship in the service of the government of France. A prize crew, under the command of an officer in the French naval service, was put on board the prize; afterwards the prize was driven, by stress of weather, to the Downs, and on the 24th of November, by order of an admiral in the French naval service, she anchored off Deal, within three marine miles of the shore. On the 26th of November, the collector of customs at Deal told the French consul there that it was time the prize left British waters. The French consul having found the *Gauntlet*, a British steam-tug, by accident at anchor in the Downs, the steam-tug, in pursuance of an agreement made between her master and the officer in command of the prize, and under the direction of such officer, towed the prize to Dunkirk Roads for the ordinary towage remuneration, which was afterwards paid by the French consul-general in London. At the time the agreement was made, the master, who was one of the owners of the steam-tug, had reasonable cause to believe that the prize was a prize of war, captured by the French.—In a suit instituted on behalf of the Crown, for the condemnation of the steam-tug:—*Held*, that no offence against the Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90), had been committed.—*Semble*, that the steam-tug was not employed in the military or naval service of France.—*Quære*, Whether it is necessary, to complete the title of the captor to prize of war, that the prize should be carried within the territory of the captor. The Gauntlet [381

3. —— (*34 Vict. c. 90), ss. 8, 19—Practice—Release of Ship on Bail.*] Where a cause is instituted under the provisions of the Foreign Enlistment Act, 1870, against a ship in respect of which an offence against the Act is alleged to have been committed, the Court may, with the consent of the Crown, order the ship to be released on bail:—*Semble*, the Court may make such order without the consent of the Crown.—Where such order is made, bail will be required for the full value of the ship and her equipment, but not for any further sum for costs. The Gauntlet - 319

FREIGHT—*Liability for Damage—Jurisdiction in respect of Freight.*] By a charterparty made on the 4th of August, between the master of the barque *O.* and a merchant, it was stipulated that the barque *O.* should proceed with a cargo of salt from Liverpool to Viborg, and there deliver the same on being paid freight. By another charterparty made on the 5th of August, between the said master and another merchant, it was stipulated that the *O.* should proceed to Viborg (with liberty to take an outward cargo for owner's benefit) and there load a cargo of deals and proceed therewith to Grimsby, and deliver the same on being paid freight as stipulated. The *O.* proceeded with her outward cargo to Viborg, and there loaded her homeward cargo and proceeded with it to Grimsby. The *O.*, while on her outward voyage, came into collision with and did damage to the barque *E.* The owners of the *E.* instituted a suit for damage against the *O.* and her freight, and upon her arrival at Grimsby arrested her, and arrested her homeward cargo, for the freight due in respect thereof. The value of the *O.* was not sufficient to satisfy the claim of the plaintiffs:—*Held*, that the *O.* was at the time of the collision in the course of earning the homeward freight, and that the homeward freight was liable to contribute to satisfy the claim of the plaintiffs.—The jurisdiction of the Court in respect of freight considered. The Orpheus - - - 308

—— Pro ratâ - - - - 394, 436

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INCENSE—Use in church - - - 58
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INJUNCTION—Jurisdiction of Court of Admiralty to restrain action - - - 152
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INSPECTION OF DOCUMENTS - - 23
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INTEREST—Money paid into court - 38
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—— Shipowners—Liability - - - 6
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INTERROGATORIES IN ADMIRALTY COURT—*Discovery—Knowledge, Information, and Belief—The Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *s.* 17—*The Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *ss.* 50, 51, 52—*Practice.*] The plaintiffs, in a cause, applied to the Court for leave to deliver certain interrogatories to the defendant. The application was made upon an affidavit of the plaintiffs and their solicitor, stating that the deponents believed that the plaintiffs would derive material benefit in the cause from the discovery which they sought, and that there was a good cause of action upon the merits. The interrogatories asked, among other things, whether any and what documents relating to the cause were in possession of the defendant. The defendant opposed the application upon the ground that the Court ought not to grant leave to the plaintiffs to deliver interrogatories for the discovery of documents without an affidavit by the plaintiffs of their belief that some document, to the production of which the plaintiffs were entitled, was in the possession or power of the defendant. The Court overruled the objection, and granted the application.—In answer to interrogatories delivered by the plaintiffs in a cause by leave of the Court to be answered by the defendant by affidavit in the usual way, the defendant stated upon affidavit, "I am personally wholly unacquainted with the facts . . . and am unable to answer any of them from my own knowledge, save as hereafter appears":—*Held*, upon an application on behalf of the plaintiffs to direct the defendant to give by affidavit further and fuller answers, that the affidavit in answer was insufficient, and that the defendant was bound to answer according to her information and belief. The Minnehaha - - - - - - 148

JURISDICTION—Admiralty - - 314
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—— Admiralty—Breach of contract - 436
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—— Admiralty—Co-owners - - 29
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LIABILITY—Shipowners—Limitation [6, 24, 152, 539
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LIFE—Salvage - - - - 487
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LIMITATION OF SHIPOWNER'S LIABILITY—*Damage to two Ships on one Occasion—The Merchant Shipping Act Amendment Act*, 1862 (25 & 26 *Vict. c.* 63) *s.* 54—*The Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 506.] By reason of the improper navigation of a steam-ship she ran into and damaged a ship, and immediately afterwards ran into and sank a steam-tug which was near the ship, and about to take the ship in tow. In a suit for limitation of liability instituted on behalf of the owner of the steam-ship it was held that the whole of the damage so caused by such improper navigation as aforesaid to the ship and steam-tug and goods on board the ship and steam-tug was caused substantially at the same time and on the same occasion, and that the plaintiff, who was entitled to have his liability limited according to the provisions of the 54th section of the Merchant Shipping Act Amendment Act, 1862, was entitled to have his liability in respect of the whole of such damage limited to an amount not exceeding 8*l.* per ton for each ton of his steam-ship's tonnage. The Rajah - - - 539

2. —— *Interest—Merchant Shipping Act*, 1862 (25 & 26 *Vict. c.* 63), *s.* 54.] The owners of a ship

LIMITATION OF SHIPOWNER'S LIABILITY—*continued.*

claiming in the Court of Admiralty to have their liability limited, in respect of damages occasioned by collision, to an aggregate amount not exceeding 8*l.* for each ton of the ship's tonnage, are liable to pay interest on such aggregate amount from the date of the collision. The Northumbria - 6

3. —— *Jurisdiction—The Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *s.* 13.] Where proceedings in rem have been instituted in the Court of Admiralty against a vessel, and bail has been given for the vessel, the Court has jurisdiction to entertain a suit instituted by the owners of the vessel for limitation of liability, although the vessel may not actually have been under arrest of the Court of Admiralty. The Northumbria - - 24

4. —— *The Merchant Shipping Act*, 1862 (25 & 26 *Vict. c.* 63), *s.* 54 — *Jurisdiction — The Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 514—*The Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *ss.* 13, 34—*Vessel or Proceeds thereof under Arrest—Injunction to restrain Actions at Common Law.*]—Two vessels, the *Normandy* and the *Mary*, came into collision. In consequence of the collision the *Normandy* sank at sea, and was lost, together with her cargo, and some of her crew and some passengers on board her were drowned; and the *Mary* and her cargo were damaged. A damage suit was instituted in the Court of Admiralty by the owners of the *Normandy* against the *Mary*, and bail was given in the suit by the owners of the *Mary* in pursuance of an undertaking contained in a præcipe for a caveat warrant. A cross-suit was instituted in the Admiralty Court against the *Normandy* by the owners of the *Mary* and by the owners of the cargo of the *Mary*; the owners of the *Normandy* paid into court the amount in which the cross-suit was instituted. Whilst these suits were pending, the owners of the *Normandy* instituted in the Court of Admiralty a suit of limitation of liability, and, before the hearing of the damage suits, applied to the Court for an order to stop all actions pending in relation to their liability for loss occasioned by the collision:—The Court held, that it had jurisdiction to entertain the suit for limitation of liability, and granted, upon terms, an order to stay all actions pending in any other court relating to the subject-matter of the suit. —The order was served upon M., the plaintiff in an action at common law brought against the London and South Western Railway Company, who were the owners of the *Normandy*, to recover damages for the loss of goods, forming part of the cargo of the *Normandy*, which had been received by the company in London to be carried for M., from London to Jersey:—Motion on behalf of M. to dissolve the order, so far as it affected M., refused. The Normandy - - - 152

LIMITED LIABILITY—Shipowners **6, 24, 152, 539**
See Limitation of Shipowner's Liability. 1, 2, 3, 4.

LORD CAMPBELL'S ACT—(9 & 10 *Vict. c.* 95)—*Jurisdiction—Damages for the Death of an Alien caused by wrongful Act, Neglect, or Default on the High Seas.*] In a damage suit instituted against the vessel *A.*, it was alleged in the petition that the *A.* ran into the vessel *B.* at sea, and caused her to founder, whereby some of the crew of the *B.* and a passenger on board her were drowned, and that the collision was caused by the improper navigation of the *A.* The legal personal representatives of the deceased persons were plaintiffs in the suit. The owners of the *A.* in their answer pleaded, as to the claim made on behalf of the legal personal representatives of the deceased persons, that the collision took place on the high seas, that the deceased persons were aliens, and the *B.* a French vessel. On motion the Court ordered the paragraphs of the answer containing these allegations to be struck out as irrelevant. The provisions of Lord Campbell's Act extend to a case where the person in respect of whose death damages are sought to be recovered was an alien, and was at the time of the wrongful act, neglect, or default which caused his death on board a foreign vessel on the high seas. The Explorer - - - - 289

LORD CAMPBELL'S ACT—*continued.*

2. —— *Loss of Life—Damage caused by Collision—Claim for Compensation on behalf of an Infant en Ventre sa Mère.*] A brig, by the negligence of those on board her, came into collision with a barque on the 15th of January, about 5 A.M., off the Lizard. In the collision the main rigging of the barque was carried away, and shortly afterwards her fore and main masts went by the board. Towards evening the wind increased in violence, and about 2 A.M. the next morning the barque was driven on shore, and some of her crew were drowned:—*Held*, that the loss of life was occasioned by the collision.—In a suit for limitation of liability, instituted on behalf of the owners of the brig, an appearance was entered on behalf of a child of one of the drowned men en ventre sa mere. The Court reserved leave to the child, en ventre, if born, within due time, to prefer its claim for damages sustained by the death of its father. The George and Richard - - - - 466

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MERCHANT SHIPPING ACT, 1862 6, 152, 539
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MORTGAGE—Ship—Interest on money paid into court - - - - 38
See Mortgage of Ship.

—— Ship—Priority - - - 345
See Necessaries for Ship. 2.

MORTGAGE OF SHIP — *Interest on the Money paid into Court by Defendant to procure Release of Ship.*] A ship was mortgaged to the defendant to secure a sum exceeding 1400*l.*; the mortgage was duly registered, and the defendant took possession of the ship and advertised her for sale. Before the sale the plaintiff, who held a mortgage on the ship, made and registered after the date of the registration of the mortgage to the defendant, instituted a suit against the ship to enforce his mortgage, and caused the ship to be arrested. The defendant, to obtain the release of the ship, paid 500*l.* into court in lieu of bail. The ship was sold by the defendant, and the proceeds were insufficient to satisfy the defendant's mortgage. The plaintiff, when the cause was ripe for hearing, abandoned the suit. The Court condemned the plaintiff in costs, and ordered him to pay to the defendant interest on the 500*l.* paid into court, The Western Ocean - - - 38

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See County Court Jurisdiction. 3.

NECESSARIES FOR SHIP—*Money advanced to discharge a Shipwright's Lien on a Vessel.*] A., being master and sole owner of a vessel, put her into a shipwright's dock for repair. The shipwright repaired the vessel, and refused to allow her to leave his dock until his bill for the repairs was paid for. A. having no funds, the plaintiff lent him money to pay the shipwright's bill, and A. paid the bill with the money lent:—*Held*, that the plaintiff was entitled to recover the amount of the loan in a suit for necessaries. Proceeds of the Albert Crosby - 37

2. —— *Mortgage—Priority—Maritime Lien—Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *ss.* 4, 5.] A British colonial vessel was mortgaged by her owners to B. The instrument of mortgage was duly registered. In February, 1868, in the port of London, the plaintiffs, by the order of the master, did work and furnished supplies to the ship necessary to put her in a seaworthy condition. In July, 1868, B. executed an instrument for the transfer of the mortgage to the defendant. This transfer was without valuable consideration, and was made to enable the defendant to take charge of the ship B. In July, 1868, the defendant took possession of the ship. Afterwards the plaintiffs instituted a suit against the ship to recover the amount due to them for the work and supplies. At the time of the institution of the suit the owners of the ship were domiciled in Nova Scotia. The proceeds of the ship were insufficient to satisfy the claim of the plaintiffs

NECESSARIES FOR SHIP—*continued.*

and the mortgage debt:—*Held*, that the plaintiffs were not entitled to have the amount of their claim paid out of the proceeds until the mortgage debt had been satisfied.—The 5th section of the Admiralty Court Act, 1861 (24 Vict. c. 10), considered.—*The Pacific* (Bf. & L. 243) commented on. The Two Ellens - - - 345

3. —— *Master's Wages—Priority of Payment.*] A master and part owner of a foreign ship ordered necessaries for the ship. The necessaries were supplied, and the master became liable for the payment of the same:—*Held*, that the persons who supplied the necessaries were entitled to be paid for the necessaries out of the proceeds of the ship and freight in priority to a claim of the master for wages and disbursements. The Jenny Lind - - - - - - 529

4. —— 3 & 4 *Vict. c.* 65, *s.* 6.] In 3 & 4 Vict. c. 65, s. 6, the word "necessaries" is used in the sense in which it is understood at common law.—The definition of the term "necessaries" given by Lord Tenterden in *Webster* v. *Seekamp* (4 B. & Ald. 352) adopted and applied in proceedings in Admiralty.—*Semble*, there is no distinction between necessaries for the ship and necessaries for the voyage.—*The Comtesse de Frègeville* (Lush. 329) observed upon. The Riga - - 516

—— Solicitor—Priority - - - 505
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NOTICE TO ADMIT—*Practice—Costs—Admission of Documents—Neglect to give Notice to admit Copies of Depositions made before a Receiver of Wreck—Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *s.* 19.] The plaintiffs, in a collision suit, considering the statements contained in depositions made by the crew of defendants' ship before a receiver of wreck damaging to the defendants' case, subpœnaed the receiver of wreck to produce the original depositions at the hearing of the cause, and did not call upon the defendants to admit copies. The receiver of wreck obeyed the subpœna. The Court pronounced the defendants' vessel alone to blame, and condemned the defendants in the costs of suit. The registrar, in taxing the plaintiffs' bill of costs, disallowed the costs of the subpœna and the expenses of the attendance of the receiver of wreck.—On motion to review the taxation, the Court refused to interfere with the decision of the registrar. The Cromwell - - - - - 316

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PRIORITY OF DECREE—*Practice—Payment of Money out of Court — Caveat against the Payment of Money—Revocation of Decree in Suit in rem.*] The rule that the Court will give priority to the suitor who first obtains a decree applies only as between claimants in pari conditione. — Where, in a suit in rem, a decree has been made per incuriam for the payment of money out of the proceeds in court to satisfy the claim of the plaintiff, the Court may, before the money has been paid, revoke or vary the decree. The Markland - - - - - 340

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See Foreign Elistment Act, 1870. 2.
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PRODUCTION OF DOCUMENTS—*Practice—Costs.*] Before the Court moving for an order for inspection of documents, previous application should be made to the parties in possession of them: unless the applicant does so he may be condemned in costs. The Memphis - - - - - 23

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RELEASE OF VESSEL ON BAIL—*Practice—Cause instituted in a Sum insufficient to cover Costs—Ship released on Bail ordered to be re-arrested—Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *ss.* 15, 22.] A cause of damage to cargo was instituted against a foreign ship in the sum of 500*l.* The owners of the ship appeared as defendants in the cause, bail was given in the sum of 500*l.*, and the ship was released. The cause proceeded to hearing, and the Court condemned the defendants in damages and costs. The damages were assessed at 452*l.* 2*s.* 8*d.*, and the costs of the plaintiffs in the suit were taxed at 432*l.* 10*s.* 3*d.* The defendants paid to the plaintiffs 500*l.*, and denied their liability to pay any

RELEASE OF VESSEL ON BAIL—*continued.*
further sum. Afterwards, the ship being within the jurisdiction, the Court, upon the application of the plaintiffs, ordered a writ to issue directing the marshal to arrest the ship for the payment of the balance of costs due to the plaintiffs. The Freedom - - - - - - 495
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RESIGNATION OF PROMOTER — *Practice — Amendment.*] A cause having been sent to the Arches Court by letters of request, from the Bishop of Winchester in the first instance, the letters of request were accepted by the judge of the Arches Court. A decree by letters of request issued, calling upon the defendant to appear, and the defendant appeared. Afterwards, the Bishop of Winchester, who was the promoter of the cause, resigned his see:—*Held*, that the cause had not abated, and that it might be continued at the suit of the same promoter in his individual capacity on the title of the cause being amended. The Bishop of Winchester *v.* Wix - 19

RESTRAINT OF PRINCES—Contract—Breach [424, 583, 597
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SAILING RULES — *Regulations for Preventing Collisions at Sea — Rule* 20.] When a vessel casting off from moorings in a navigable river places herself at night partly athwart the fairway, so that her regulation lights cannot be seen by vessels astern of her coming up the river, she is bound to make use of some conspicuous signal to warn them of her position. The John Fenwick - - - - - - - 500

2.—— *Collision—Regulations for Preventing Collisions at Sea, Articles* 15, 18, 19.—*Duty of Steam-tug with a Vessel in tow to keep out of the Way of a sailing Vessel.*] A schooner, close hauled on the starboard tack at night, saw the starboard light and the two towing lights of a steam-tug three points on her port bow about a mile off. The schooner kept her luff. The steam-tug had a fully laden ship in tow, and was steaming against a head wind in the open sea. The steam-tug kept her course until it was too late to get out of the way of the schooner, and the steam-tug and the schooner came into collision:—*Held*, that the schooner was right in holding her course, and that the steam-tug was alone to blame. The Warrior - - - - - - 533

3 —— *Vessels beating to Windward on the same Tack going about.*] Two vessels, which had been sailing in company, were beating to windward. They were both close hauled on the same tack, the one ahead and a little to the windward of the other. The leading vessel stood in as near as she could to a shoal, and was then obliged to go about. The other vessel kept her reach. The two vessels came into collision:—*Held*, that it was the duty of the following vessel to have gone about at the time she saw the leading vessel go about; and that, as the collision was occasioned by the following vessel neglecting to go about at the proper time, she was to blame for the collision. The Priscilla - - - - - - 125

SALVAGE—*Agreement to fix the Amount.*] Where an agreement to fix the amount of the remuneration to be paid for salvage services has been deliberately entered into at the time of the commencement of the danger between perfectly competent parties, the Court will not allow the agreement to be set aside, merely because the execution of it has turned out more difficult than was anticipated at the time of making the contract.—The circumstances under which such contracts may be set aside, considered. The Waverley 369

2. —— *Towage—Circumstances under which a Towage Contract may be superseded by the right to Salvage.*] A steam-tug entered into a contract to tow a ship at sea into the port of Liverpool for 45*l.* During the performance of the service a hurricane arose and the vessels were in serious danger. The tug, at great peril to herself, continued to tow the ship during the hurricane, and by so doing prevented the ship drifting upon a lee-shore. The wind soon afterwards moderated, and the tug, still continuing to tow the ship, brought her into the port of Liverpool in safety:—*Held*, that the tug was entitled to salvage reward. The criterion by which it is to be ascertained whether a vessel under contract to tow has become a salvor is, whether supervening circumstances have occurred such as to justify her in abandoning the contract of towage; and in order to justify her in abandoning the contract of towage, there must be among the supervening circumstances an element of serious danger, which was not in the contemplation of the parties at the time they entered into the contract. A tug under contract to tow a ship into port may be entitled to salvage reward for bringing the ship into port, although nothing has occurred to occasion an actual interruption to the towage. The I. C. Potter - - - - - - 292

3. —— *Passengers' Wearing Apparel—Life Salvage—Services rendered wholly or in part in British Waters—The Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 458—*The Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *s.* 9—*The Merchant Shipping Act*, 1862 (25 & 26 *Vict. c.* 63), *s.* 59.] Services were rendered, by means of which a vessel and the goods on board her were saved from total loss, and the lives of a number of passengers on board her were saved. Suits were instituted on behalf of the persons who rendered the services, against the vessel and her cargo, to recover salvage reward:—*Held*, that the wearing apparel of the passengers, and other things belonging to them, ejusdem generis, on board the vessel, were privileged from arrest.—A Dutch vessel took fire on the high seas, and some of her crew and some

SALVAGE—*continued.*

passengers who were on board her escaped in boats, and were picked up by a French schooner. The schooner afterwards fell in with a British steam-vessel, and the persons who had been picked up by the schooner were, at their own request, put on board the steam vessel, and were carried by her into an English port. The schooner was not within British waters during any portion of the time when the services were rendered:—*Held*, that the schooner had not rendered services such as to entitle her to claim salvage reward by virtue of the provisions of the Merchant Shipping Act, 1854, or the Admiralty Court Act, 1861. The Willem III. - - - - 487

4. —— *Services rendered on the High Seas by putting two of the Crew of a Ship on Board a Vessel in Distress for want of Hands—Right of Owners, Master, and Crew to participate in Salvage Reward.*] A ship fell in on the high seas, in the winter season, with a brig in distress for want of sufficient hands to work her. The master of the ship sent two of his crew, who had volunteered to go on board the brig, and by their assistance the brig was navigated safely into a British port. In consequence of the absence of the two men, the ship was exposed to risk, and the remainder of her crew had to undergo extra labour:—*Held*, that not only the two men who went on board the brig, but the master and owners of the ship and the rest of the crew of the ship, were entitled to salvage reward for the services rendered. The Charles - - - - - 536

5. —— *Right of Charterer to Salvage Reward—Practice—Consolidated Salvage Suit—Right of Plaintiffs to appear by separate Counsel.*] By agreement between the owner of a steamer and C., C. agreed to charter the steamer for the purpose of running between certain named ports, and to pay a sum weekly for the use of the steamer until the agreement was determined in manner therein provided. The agreement provided that C. should pay all expenses of the crew and other expenses incidental to the running of the steamer, excepting only marine insurance, which was to be defrayed by the owner; that the steamer should be delivered up by C., on the termination of the agreement, in as good condition as at the time of making the agreement, reasonable wear and tear excepted: that the master should not, except in the event of his misconduct, be removed by C. without consent of the owner. The steamer, while running under this agreement, fell in with a disabled vessel and towed her into safety:—*Held*, that C. was entitled to salvage reward, in respect of the service rendered by the steamer, and that the owner was not entitled to salvage reward.—When the interests of one of the plaintiffs in a consolidated salvage suit, is adverse to the interests of the other plaintiffs, separate counsel on his behalf may be heard at the hearing of the consolidated cause. The Scout - 512

6. —— *Right of a Seaman to claim Salvage for Service rendered to his own Vessel.*] Two vessels came into collision on the high seas. One of the vessels (a barque) received damage, and all her crew, except her mate, escaped on board the other vessel. The mate of the barque remained on board her, and navigated her until he obtained

SALVAGE—*continued.*

assistance from a steam vessel. The steam vessel then took the barque in tow and brought her into port in safety, the mate still assisting in her navigation:—*Held*, that in awarding salvage to the owners, master, and crew of the steam vessel, the right of the mate of the damaged ship to claim salvage reward for his services should be taken into consideration, and that the mate, upon his claim being brought before the Court, was entitled to rank as a salvor. The Le Jonet - 556

7. ——*Right of Owners of Salving Vessel to Salvage Reward in a Case where some of them were also Owners of the Vessel which occasioned the Mischief.*] By the improper navigation of a steam-tug B., a vessel at anchor was sent adrift and placed in jeopardy. A steam-tug, W., rendered assistance to the drifting vessel:—*Held*, that the owners of the W. were entitled to recover salvage reward for the services rendered, notwithstanding that some of them were also owners of the vessel which occasioned the mischief. The Glengaber 534

8. —— *Crew—Ships belonging to the same Owners.*] The *N.* and the *S.* were steam vessels belonging to the same owner. The *N.* in the prosecution of a voyage observed the *S.* in a disabled condition on the high seas. By means of exertion and labour on the part of the crew of the *N.*, the *N.* got the *S.* in tow, and towed her into a port of safety. In rendering this service the *N.* deviated from her voyage:—*Held*, that the crew of the *N.* were entitled to sue the *S.* for salvage remuneration. *The Maria Jane* (14 Jur. 857) distinguished. The Sappho - - 142

9. —— *Services rendered by one Vessel to another belonging to the same Owners.*] A steam vessel laden with a general cargo became disabled at sea in consequence of her machinery breaking down. Her cargo had been shipped under bills of lading which contained among the excepted perils "accidents from machinery." Another steam vessel belonging to the same owners fell in with the disabled vessel and towed her into safety:—*Held*, that the owners of the vessel rendering the service were entitled to recover salvage remuneration against the cargo laden on board the disabled vessel, and that the master and crew of the vessel rendering the service were entitled to recover salvage remuneration against the disabled vessel, her freight and cargo. The Miranda - - - - - 561

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SOLICITOR'S LIEN—*Costs—Charge upon Property preserved*—23 & 24 *Vict. c.* 127, *s.* 28—*Right to Priority of Payment out of Fund in Court.*] A foreign vessel was arrested in a suit instituted under the 6th section of the Admiralty Court Act, 1861 (24 Vict. c. 10). The master, who was a part owner, acting on behalf of himself and his co-owners, instructed solicitors to defend the suit. The solicitors defended the suit, and it was dismissed with costs. Afterwards suits were instituted against the vessel and freight in respect of claims for necessaries; in these suits claims were made for necessaries furnished after the institution of the former suit. The vessel having been sold, and the proceeds and freight having been brought into Court, and the solicitors for the owners of the vessel being unable to obtain payment of the costs incurred by them in defending the former suit:—*Held*, that the solicitors were entitled to be paid out of the proceeds in court such costs in priority to the claims in respect of necessaries supplied after the institution of the first mentioned suit.—*Held*, also, that the claim of the solicitors for such costs was entitled to take priority of a claim preferred by the master for his wages. The Heinrich - - - - - - 505

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TENDER—*Practice—Costs.*] The defendant in a cause may, by act in court, tender a sum of money in satisfaction of the plaintiff's claim, and reserve the question whether he is liable to pay costs. The Hickman - - - 15

2. —— *Practice — Form of Tender when no Costs are tendered.*] A tender which does not contain an offer to pay costs must specify the grounds upon which the defendant contends the plaintiff is not entitled to costs. The Thracian [504

TOWAGE—*Jurisdiction—Duty of Pilot in charge of Ship in Tow to direct the Navigation of the Tug.*] The Court of Admiralty has jurisdiction to entertain a suit instituted by the owners of a vessel against a steam-tug engaged to tow the vessel for negligently towing the vessel so as to cause her to come into collision with and do damage to another vessel.—Where a steam-tug is engaged to tow a vessel which is in charge of a pilot, the tug is bound to obey the orders of the pilot, and the pilot is bound to give the tug proper directions and to superintend her navigation.—A barque, in charge of a pilot who was on board her, was being towed by a steam-tug in waters where the employment of a pilot was compulsory. The tug ported her helm, and passed across the bows of a brig under way, there was no room for the barque to follow in her wake, and the barque came into collision with the brig. The pilot gave no orders to the tug before or after she ported; if he had given proper orders, even after the tug had ported, the collision might have been avoided:—*Held*, that the tug was to blame for attempting to tow the barque across the bows of

TOWAGE—*continued.*

the brig; but that the owners of the barque could not, on account of the neglect of the pilot to give proper orders, recover against the tug damages in respect of the collision. The Energy - 48

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